106

No. ____

Supreme Court, U.S.
FILED
08-405 SEP 23 2008
OFFICE OF THE CLERK
William K. Suter, Clerk

IN THE

Supreme Court of the United States

CROSS COUNTRY BANK, INC.,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK, by ANDREW CUOMO, Attorney General of the State of New York,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

HOWARD N. CAYNE
Counsel of Record
NANCY L. PERKINS
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, DC 20004
(202) 942-5000

H. PETER HAVELES, JR.
ARNOLD & PORTER LLP
399 Park Avenue
New York, New York 10022
(212) 715-1000

Attorneys for Petitioner

September 23, 2008

QUESTIONS PRESENTED

Did the New York Court of Appeals fail to abide by the dictates of the Supremacy Clause in holding that the federal Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* ("TILA"), did not preempt the Attorney General of the State of New York (the "Attorney General") from asserting a claim under state law that credit card solicitation disclosures were misleading and deceptive when: (i) for the explicit legislative purpose of establishing nationwide uniformity in credit card solicitation disclosures, Congress amended TILA in 1988 to include an express preemption provision, 15 U.S.C. § 1610(e), that barred the States from directly or indirectly regulating the content or format of disclosures in credit card solicitations and vested the Board of Governors of the Federal Reserve with exclusive authority to prescribe the content of all disclosures in credit card solicitations and the manner in which they are presented; (ii) the Court of Appeals allowed the Attorney General to assert a claim that the disclosures at issue were insufficient and should be presented in a different manner, even though they fully complied with the requirements set forth under TILA; and (iii) the New York Court of Appeals affirmed the issuance of an injunction barring the use of the disclosures that fully complied with the requirements established under TILA?

CORPORATE DISCLOSURE STATEMENT

The Caption of the Case Contains the Names of all but one of the Parties to the Proceeding in the Court whose Judgment is sought to be reviewed. The other party was Applied Card Systems, Inc.

Pursuant to Supreme Court Rule 29.6, Petitioner hereby states that it is a wholly-owned subsidiary of Applied Card Holdings, Inc.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE DOCUMENT	ii
TABLE OF AUTHORITIES	vi
PRELIMINARY STATEMENT	1
CITATIONS OF DECISIONS	4
STATEMENT OF JURISDICTION	4
STATUTE AT ISSUE	4
STATEMENT OF THE CASE	4
I. Nature of the Proceeding	4
II. The Proceedings Below	5
III. The Court of Appeals' Preemption Ruling	7
IV. Statement of Facts	15
V. The Attorney General's Claims against CCB	19
REASONS WHY CERTIORARI SHOULD BE GRANTED	21

PAGE

POINT I IN DEROGATION OF THIS COURT'S HOLDINGS, THE COURT OF APPEALS' DECISION FUNDAMENTALLY OVERRIDES AND NEGATES TILA'S TOTAL PREEMPTION OF STATE REGULATION OF CREDIT CARD SOLICITATION DISCLOSURES 22

A. Congress Intended that TILA Totally Preempt State Law Regulation 25

B. TILA Preempts the Entire Field of Credit Card Solicitation Disclosure Requirements..... 29

POINT II THE COURT OF APPEALS' DECISION WILL DESTROY THE NATIONAL UNIFORMITY ESTABLISHED BY TILA 34

CONCLUSION 38

APPENDIX

People of the State of New York ex rel. Spitzer v. Applied Card Systems, Inc., 11 N.Y. 3d 105 (2008)..... 1a

PAGE

People of the State of New York ex rel. Spitzer v. Applied Card Systems, Inc., 27 A.D.3d 104 (3d Dep't 2005) 51a

15 U.S.C. § 1610 ..... 60a

TABLE OF AUTHORITIES

Cases: PAGE

Arkansas Electric Cooperative v. Arkansas Public Service Commission, 461 U.S. 375 (1983) 33

Barnhart v. Thomas, 540 U.S. 20 (2003) 11

California Federal Savings & Loan Association v. Guerra, 479 U.S. 272 (1987) 25

California v. Federal Energy Regulatory Commission, 495 U.S. 490 (1990) 28

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 25

Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141 (2001) 30

FMC Corp. v. Holliday, 498 U.S. 52 (1990) 30

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) 30

Medtronic v. Lohr, 518 U.S. 470 (1996) 14, 25

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 30

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645 (1995) 8-9

PAGE

Northern Natural Gas Co. v. State Corporation Commission, 372 U.S. 84 (1963) 29

Pilot Life Insurance Co. v. Dedaux, 481 U.S. 41 (1987) 30

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 34

Riegel v. Medtronic, Inc., 128 S. Ct. 999 (2008) 2, 10, 21, 23, 32

Rosario v. Diagonal Realty, LLC, 8 N.Y.3d 755 (2007), *cert. denied*, 128 S. Ct. 1069 (2008) ... 25

Rowe v. New Hampshire Motor Transportation Association, 128 S. Ct. 989 (2008).....25, 30

Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988) 28

State Farm Bank, FSB v. Reardon, 539 F.3d 336 (6th Cir. 2008) 37

Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559 (2007) 2-3, 34

Statutes and Other Authorities:

15 U.S.C. § 1257(a) (1988) 4

15 U.S.C. § 1601(a) (1976).....13, 25

15 U.S.C. § 1610(a)(1) (1994).....13, 26

15 U.S.C. § 1610(e) (1994) .....*passim*

PAGE

15 U.S.C. § 1632 (1988) 26, 27

15 U.S.C. § 1637(c) (2005) ..... *passim*

15 U.S.C. § 6807(a) (1999) 26

21 U.S.C. § 360k(a)(1) (1976) 23, 24

12 CFR Part 226, Supp. I (2008) 26, 31

12 C.F.R. § 226.5a (2007) 17, 29

12 C.F.R. § 226.28(d) (2008) 29

21 C.F.R. § 808.1(d)(1) (2008) 23

Fair Credit and Charge Card Disclosure Act, Pub. L. No. 100-583, 102 Stat. 2960 (1988) 26

134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988) 36

Credit and Charge Card Disclosures, 54 Fed. Reg. 13,855 (Apr. 6, 1989) 27

Truth in Lending, 72 Fed. Reg. 32948 (June 14, 2007) 33

Truth in Lending, 73 Fed. Reg. 28866 (May 19, 2008) 33

Joseph W. Gelb & Peter N. Cubita, *The Fair Credit and Charge Card Disclosure Act of 1988: A Federal Alternative to the Rate Ceiling Approach*, 44 Bus. Law. 941 (1988-1989) 35

PAGE

Jonathan A. Sheldon, *Unfair and Deceptive Acts and Practices* (6th ed. 2004) 36

Brief for the State of New York, et al. as Amici Curiae, *Riegel v. Medtronic, Inc.*, No. 06-179, 2007 WL 2456949 (Aug. 27, 2007)..... 23

PRELIMINARY STATEMENT

In defiance of an express and unambiguous federal prohibition against state regulation of consumer credit card disclosures, the State of New York has unilaterally seized the authority to supplement the uniform regulatory system mandated by Congress, and has imposed a separate and parallel scheme of state regulation. Despite the plain command in the federal Truth in Lending Act, 15 U.S.C. § 1601, *et seq.* ("TILA"), that, without exception, federal disclosure requirements "supersede any provision of the law of any State relating to the disclosure of information in any credit or charge card application or solicitation," 15 U.S.C. § 1610(e) (1994), the New York Court of Appeals, over a vigorous dissent, held that New York could impose both additional disclosure obligations and penalties for not having made those additional disclosures. The Court of Appeals also ignored the interpretation of the Board of Governors of the Federal Reserve (the "Federal Reserve Board"), the regulatory agency charged with exclusive responsibility for implementing TILA's disclosure requirements as well as preserving the integrity of the credit system, and substituted its erroneous interpretation of TILA.

To support its refusal to abide by Congress' express preemption of state law, the Court of Appeals recycled the discredited argument that state tort and consumer protection laws do not impose additional disclosure requirements, holding that New York law here merely requires parties "to refrain from fraud, deception and false advertising . . ." and does not require a party "to

disclose anything." (11a) But as this Court has recognized repeatedly—most recently in *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008)—such state laws "impose liability 'premised on the existence of a legal duty,' and a tort judgment [here, a judgment under a state false and deceptive practices statute] therefore establishes that the defendant has violated a state-law obligation. And while the common law remedy is limited to damages, a liability award 'can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'" *Id.* at 100 (citations omitted).

The impact of the Court of Appeals' disruption of the federal regulatory structure is important and immediate. The nationwide regulation mandated by Congress strongly militates against dismissing this decision as merely an outlier or letting the issue percolate through the lower courts. New York is the financial capital of the country. Many of this country's largest national banks are headquartered there. Virtually all of them have branches there. They and all the nation's other issuers of credit cards routinely do business with consumers in New York, and they would have to modify their credit card disclosures made to those consumers to satisfy the supplemental New York requirements. And beyond this enormous impact, there would be vast material repercussions, as virtually every State maintains laws paralleling the New York law at issue in this case.

Private plaintiffs and state Attorneys General have assiduously tried to chip away at federal uniformity. As this Court recognized in *Watters*

v. Wachovia Bank, 127 S.Ct. 1559 (2007), those efforts have had adverse consequences in direct contravention of Congressional intent. Allowing the New York Court of Appeals' decision to stand would unleash countless state law challenges to credit card practices in an area that Congress declared to be exclusively within the province of the federal government. Inevitably, the proliferation of cases judging the adequacy of companies' disclosures under state law standards will undermine the uniform nationwide system of regulation of the issuers of credit cards, which includes a substantial portion of the financial services industry in the United States.

At a time when financial institutions are facing many challenges, the Courts of Appeals' erroneous decision threatens nationwide harm to the lending industry by imposing the very burdens that Congress specifically decided to prevent when it enacted Section 1610(e) after 20 years of regulation under TILA. The costs of complying with the laws of 50 different states—and potentially many more localities—that credit card issuers will likely incur when other States follow the Court of Appeals' reasoning will substantially impair the ability of those institutions to offer credit to consumers across the nation. Indeed, it is that very harm that caused Congress to mandate in plain and unambiguous language that there be exclusive federal regulation of credit card disclosures. And it is that very harm that urgently requires this Court to review the decision of the Court of Appeals.

CITATIONS OF DECISIONS

People of the State of New York ex rel. Spitzer v. Applied Card Systems, Inc., 11 N.Y.3d 105 (2008) (1a-50a); *People of the State of New York ex rel. Spitzer v. Applied Card Systems Inc.*, 27 A.D.3d 104 (3d Dep't 2005) (51a-59a).

STATEMENT OF JURISDICTION

The Judgments of the Supreme Court of the State of New York, Albany County, were entered on June 23, 2004 and June 26, 2006. On June 26, 2008, the Court of Appeals of the State of New York affirmed the Judgments. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988).

STATUTE AT ISSUE

15 U.S.C. § 1610 (1994). (60a-62a)

STATEMENT OF THE CASE

I. Nature of the Proceeding

In April 2003, the Attorney General of the State of New York (the "Attorney General") commenced a special proceeding under New York Executive Law § 63(12), alleging that petitioner Cross County Bank ("CCB") had violated Sections 349 and 350 of the New York General Business Law.[1] The Attorney General broadly alleged that

[1] The Attorney General also asserted claims against CCB's affiliate Applied Card Systems, Inc. ("ACS") with respect to the collection practices that ACS employed. The

CCB "deceptively induce[d] [consumers] to enter into onerous and confusing credit card agreements" that required the payment of high fees and costs in return for only "a minimal amount of usable credit." The Attorney General sought to enjoin CCB from engaging in such conduct, as well as an award of restitution and penalties.

On July 11, 2003, CCB and ACS filed their joint Verified Answer, in which they asserted numerous affirmative defenses. As one of its affirmative defenses, CCB asserted that its disclosures fully complied with TILA's requirements and federal Regulation Z promulgated thereunder and that the Attorney General therefore could not assert any claims under Sections 349 and 350.

II. The Proceedings Below

The proceedings before the trial court were bifurcated. On May 28, 2004, the trial court rendered a decision and shortly thereafter entered a partial judgment with respect to liability and injunctive relief. On January 27, 2006, the trial court entered an order assessing penalties, restitution and costs, and thereafter entered a second judgment. CCB appealed from each of those judgments to the Appellate Division, Third Department (the "Appellate Division"), including on the ground that 15 U.S.C. § 1610(e) preempted the Attorney General's claims. (51a-59a) On September 4, 2007, the Court of Appeals granted leave to appeal. On June 26, 2008, the Court of Appeals entered its Opinion and Order, affirming

---

claims asserted against ACS are not the subject of this petition.

each of the Appellate Division's Orders, including with respect to the issue of preemption. (1a-50a)

On February 11, 2004, the trial court issued an Order "to first address those issues which can be readily determined at this juncture." Among other things, the trial court dismissed CCB's defense under TILA. On February 25, 2004, CCB moved for reargument, and the trial court orally ruled that "the TILA preemption claim [did] not apply to the deceptive and fraudulent practices that are the subject of this proceeding under the Executive Law and the General Business Law."

On May 28, 2004, the trial court issued its decision granting injunctive relief. It held that, as a matter of law, CCB's credit card solicitations violated Sections 349 and 350 of the General Business Law. On June 23, 2004, the trial court entered a Judgment (the "First Judgment") permanently enjoining appellants "from engaging in the fraudulent, deceptive and unlawful acts and practices alleged in the Verified Petition."

On January 27, 2006, the trial court entered its Order directing respondents to pay restitution, penalties and costs. On June 26, 2004, the Court entered a Statement of Judgment reflecting the monetary award set forth in the January 27 Order (the "Second Judgment").

In 2004, CCB and ACS appealed to the Appellate Division from the First Judgment. In a Decision and Order entered December 1, 2005 among other things, the Appellate Division held that TILA did not preempt the Attorney General's claims because they were directed at unfair and deceptive practices, as opposed to disclosure obli-

gations. (58a) The Appellate Division held in a conclusory manner that the Attorney General was not seeking to establish that the disclosures were inadequate.[2] (58a)

In 2006, the parties cross-appealed to the Appellate Division from the Second Judgment. On April 5, 2007, the Appellate Division issued a Decision and Order modifying the remedies granted (the "2007 Appellate Division Decision").

CCB and the Attorney General thereafter each moved for leave to appeal to the Court of Appeals. Among other things, CCB sought leave to appeal from the Appellate Division's decision that TILA did not preempt the claims asserted by the Attorney General. On September 7, 2007, the Court of Appeals granted the two motions. On June 26, 2008, the Court of Appeals issued its Opinion and Order affirming the Judgments, including the dismissal of CCB's preemption defense.

III. The Court of Appeals' Preemption Ruling

The pertinent issue before the Court of Appeals was whether Section 1610(e) of TILA preempted the Attorney General's attempt to impose additional disclosure requirements on CCB. Section 1610(e) states:

> The provisions of subsection (c) of section 1632 of this title and subsections (c), (d),

[2] The Appellate Division held that the disclosures violated Sections 349 and 350 of the General Business Law because they did not disclose enough information and should have been presented in a different manner. (55a-57a)

> (e) and (f) of section 1637 of this title shall supersede any provision of the law of any State relating to the disclosure of information in any credit or charge card application or solicitation which is subject to the requirements of section 1637(c) of this title or any renewal notice which is subject to the requirements of section 1637(d) of this title, except that any State may employ or establish State laws for the purpose of enforcing the requirements of such sections.

15 U.S.C. § 1610(e).

In rejecting CCB's preemption defense, a majority of the Court of Appeals read Section 1610(e) as preempting state actions only to the extent that the relief sought conflicted with the requirements of TILA and Regulation Z. (9a-10a) In a detailed and carefully reasoned dissent, however, Judge Read criticized the majority for distorting the plain meaning of Section 1610(e), which expressly states that TILA's credit card solicitation disclosure requirements preempt state law, as well as for refusing to abide by Congress' express intent that there be national uniformity with respect to the regulation of credit card solicitations. (40a-41a).

The majority began its analysis by quoting inaptly from a principle articulated by this Court regarding assertions that state action is impliedly (as opposed to explicitly) preempted, *i.e.*, Congress is presumed not to supplant state law unless its intent is clear and manifest. (8a-9a) (citing *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*,

514 U.S. 645, 654 (1995)). It then concluded, without any support in the statute, that Section 1610(e) does not preempt every state law concerning disclosures in credit card solicitations and applications:

> Instead, it preempts those state laws that relate to "disclosure of information," in credit card applications and solicitations "subject to the requirements of section 1637(c) [of TILA]," not those that prevent fraud, deception and false advertising. Preemption is limited, then, to laws that purport to alter the format, content, and manner of the TILA-required disclosures and those that require credit issuers to affirmatively disclose specific credit term information not embraced by TILA or Regulation Z.

(10a) (citations omitted). The majority thus concluded that the Attorney General's claims were not preempted because Section 349 of the General Business Law requires a party merely to "refrain from fraud, deception and false advertising . . ." and does not require a party "to disclose anything." (11a)

The majority refused to follow this Court's precedent regarding construction of the phrase "relating to" as having a meaning that "express[es] a broad preemptive purpose." (13a-14a) (citations omitted). Instead, the majority disregarded the Court's precedents, and concluded that the Attorney General's claims were "too tenuous, remote or peripheral" to be "related to" the matters preempted under Section 1610(e). (14a) The majority held that its decision would not

interfere with the system established by Congress based on the unsupported assertion that it does not require CCB to alter any of the disclosures or to disclose any additional terms. (17a)

The majority stated that the constitutional principles articulated by this Court last term in *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008), are not governing for two reasons. (16a-17a) The majority recited its conclusion that Section 1610(e) does not apply to state laws prohibiting fraud or deception. (17a) It also asserted that the Attorney General's success against CCB will not " 'disrupt[ ] the federal scheme' of disclosure mandated under TILA" because no additional disclosure requirements are imposed. (*See* 17a) The majority took comfort from its belief that Congress did not preempt a State's use of unfair trade practices laws, and observed that Section 349 is just such a statute. (20a) The majority, however, did not address TILA's express limitation placed on a State's right to employ such statutes. (*See* 20a-22a)

In her comprehensive dissent, Judge Read began by stating that Section 1610(e) "preempts the Attorney General's bid to impose disclosure requirements" and that the "majority reache[d] the opposite conclusion by dint of misreading TILA's special preemption rule for credit or charge card applications or solicitations." (29a) Judge Read identified the fundamental flaw in the majority's reading of Section 1610(e):

> The majority reads the clause "which is subject to the requirements of section 1637(c)" to modify "information." Accordingly, the majority reasons, "[t]he scope

of the section 1610(e) preemption is . . . *expressly limited* to state laws relating to disclosures *specifically required* under section 1637(c)" [17a] (emphases added). The majority therefore concludes that "there is no preemption here because neither CCB's claims nor the relief it was granted below have any effect upon these disclosures" [15a]. That is, because there is no conflict between TILA's disclosure requirements and New York's consumer protection laws, CCB may (and indeed must) devise a solicitation complying with both federal and state law.

But the majority's reading of the statutory text is not correct. It completely

"disregards—indeed, is precisely contrary to—the grammatical 'rule of the last antecedent,' according to which a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows . . . While this rule is not an absolute and can assuredly be overcome by other indicia if meaning, . . . construing a statute in accord with the rule is quite sensible as a matter of grammar" (*Barnhart v Thomas*, 540 US 20, 26 [2003] [quotation marks omitted]; *see also* 2A Singer and Singer, *Statutes and Statutory Construction* § 47:33, at 487 [7th ed 2007] ["Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent"]).

> Here, the limiting clause "which is subject to the requirements of section 1637(c) immediately follows and therefore modifies "any credit or charge card application or solicitation," *not* "information."

(30a-31a) (emphasis and ellipses in original).

Judge Read reviewed the position of the Federal Reserve Board, observing that: "[t]he Federal Reserve Board, which implements section 1610(e) through its Regulation Z (12 CFR Part 226), disagrees with the majority's textual analysis . . . ." (31a). She quoted extensively from the text of Regulation Z and the Federal Reserve Board's Commentary, including the statement that "[s]tate laws relating to the disclosure of credit information on credit or charge card applications and solicitations subject to the requirements of [15 USC § 1637[c]) . . . are preempted." (31a-32a) (ellipsis in original; citations omitted). Judge Read noted that the Federal Reserve Board has concluded that:

> TILA supplants State law "requirements" that "relat[e] to the disclosure of credit information" in certain credit or charge card applications or solicitations (i.e., those that the Board has determined to be subject to the requirements of 15 USC § 1637[c]); thus, preemption is not limited to "state laws relating to the disclosures specifically required under section 1637(c)". The Board's view in this regard is entirely consonant with the statute's

> text, and with Congress' purpose in adopting a special preemption rule in the first place.

(32a-33a) (citations omitted). She then reviewed the history of TILA and Regulation Z to substantiate this conclusion. (33a-38a). She finished that analysis by concluding:

> As the discussion of the evolution of TILA preemption illustrates, before Congress adopted the special preemption rule, states supplemented federal credit disclosure requirements with regularity. If Congress had wanted this state of affairs to continue, there would have been no need for it to supplant the inconsistency/contradictory standard in section 1610(a)(1) (as interpreted by the Board in Regulation Z) with the special preemption rule in section 1610(e). By reading the special preemption rule as it does, the majority has undone Congress' handiwork: the majority has effectively reinstated the inconsistency/contradictory standard for disclosures on credit or charge card applications or solicitations. While the majority cloaks its interpretation of section 1610(e) in the garb of the presumption against preemption of state law [16a-17a], the presumption does not empower a state court to circumvent Congress' will as expressed in non-ambiguous statutory language ("In all pre-emption cases . . . we start with the assumption that the historic police powers of the States were not to be super-

> seded by the Federal Act *unless that was the clear and manifest purpose of Congress*," *Medtronic v Lohr*, 518 US 470, 485 [1996] [emphasis supplied, internal quotation marks and citations omitted]).

(40a-41a) (ellipsis and emphasis in the original).

Finally, Judge Read explained why the majority could not justify its position that there is no preemption on the ground that the Attorney General was enforcing only a statute that prohibited unfair or deceptive acts and practices. Judge Read stated that the majority took out of context a truncated comment in the Federal Reserve Board's commentary regarding the authority of a state to enforce such statutes. (42a-43a) She quoted the Commentary to demonstrate the majority's error:

> "[s]tate laws relating to *the terms of credit* required to be disclosed or the manner in which such terms are to be disclosed are preempted as to any credit or charge card application or solicitation that is subject to [15 USC § 1637[c]) . . . The preemption of such provisions of state law is *total*, and differs from other provisions of the TILA which generally preempt only inconsistent state laws" (54 Fed Reg at 13863) (emphases added).

(44a-45a) (ellipsis and emphasis in original). Judge Read stated that the majority "cannot evade preemption by portraying this enforcement action as a suit to enjoin a misleading and fraudulent 'overall impression' rather than 'inadequate disclosure.'" (45a)

> The only way for CCB to dispel the complained-about "overall impression"—the only way for CCB to comply with [the trial court's] injunction—is to revise and alter the form and content of its solicitations, i.e., to make different and/or additional disclosures. Neither the Attorney General nor the majority explains how else CCB may eliminate the alleged misrepresentations from its solicitations.

(45a-46a) (citations and footnote omitted).

IV. Statement of Facts

CCB is a Delaware bank that issues credit cards to consumers. CCB primarily issues credit cards to consumers who have no or poor credit histories. CCB is a state-chartered bank, subject to extensive regulation, supervision and examination by both the Federal Deposit Insurance Corporation and the Delaware Banking Commissioner.

In order to attract consumers and to inform them of its products, CCB sends out direct mail solicitations. It also communicates with consumers through the telephone and Internet. CCB periodically sends out hundreds of thousands of solicitations nationwide, including to consumers in New York. In these solicitations, CCB provides all the information required under TILA. It has never been disputed that CCB's solicitation materials and disclosures are truthful and accurate and comply with TILA's requirements and Regulation Z.

CCB's solicitations offered potential cardholders credit limits of "up to" $2,500 or, in some cases, "up to" $1,000. It is undisputed that CCB's solicitations never stated that a potential cardholder would receive a credit limit of $2,500 or $1,000. Since approximately November 2000, CCB's solicitations have disclosed the minimum as well as the maximum credit limit and, since June 2001, have generally disclosed the historical average of new credit lines as well. For instance, a CCB solicitation mailed in December 2001 contained the following disclosure:

> *You will receive a Visa Gold account with a minimum credit line of at least $350* if CCB can verify all information you provide, and you continue to meet our selection criteria and any other applicable criteria bearing on creditworthiness. *Your credit line (minimum $350, maximum $2,500) will be based on your creditworthiness. Initial credit lines have historically averaged approximately $400.* Over time your credit line may increase to $2,500 or higher based on payment history and other criteria bearing on creditworthiness. Our credit line increase programs may include offers that are subject to fees as well as merit increases.

(Emphasis added.)

CCB charges late payment fees and overlimit fees. The chart in each and every CCB solicitation labeled "TERMS AND CONDITIONS OF OFFER" discloses, among other things, the amount of the annual and origination fees and

the amount of the late and overlimit charges.[3] The chart is in the format dictated by TILA, and contains all the information mandated by TILA.

Upon issuance of a credit card, the cardholder receives the credit card attached to a piece of card stock. That document discloses in clear and readable type the precise credit limit, the annual fee, the account origination fee, the current APR and the current periodic rate. As of the time that it is received, the credit card is not active, and the cardholder must call an 800 number to activate it. Thus, if the cardholder decides that the terms described on the document to which the credit card is attached are unacceptable, the cardholder may reject them simply by choosing not to activate the card, and therefore will never incur any of the fees or expenses.

CCB offers a voluntary insurance program to its cardholders. In the event of a covered claim, that program makes the cardholder's minimum monthly payment or pays the account balance up to a certain dollar figure. The program is marketed nationwide, but the program in each state has varying requirements and limitations, consistent with each state's law. In New York, the program provides only death and dismemberment benefits, which are priced in accordance with New York insurance law. The New York Superintendent of Insurance specifically approved the prices and terms of these policies, as well as the certificates delivered to participating cardholders.

---

[3] This chart (which is sometimes called the "Schumer Box") is required by Regulation Z. *See* 12 C.F.R. § 226.5a (2007).

Cardholders who enroll in the program in New York are charged a premium only for the benefits specifically available in New York and not for any of the benefits available only in other states. The mail solicitation specifically provides: "coverage and costs vary by state. See the enclosed insert for specific benefit terms and conditions." Immediately above the signature line that a cardholder must execute in order to receive the optional coverage, it states: "YES! Please enroll me in the optional CAP insurance program. I have read and understood the insurance and cost disclosures as described in the enclosed insert." The insert—entitled "Optional Benefit Programs"—explicitly provides under the heading "Credit Account Protector (CAP) Benefit Description" that certain benefits are not available in New York. When a cardholder enrolls in the program, a certificate is sent to the cardholder before any premium is charged. The certificate expressly provides, in bold print, that coverage is limited to life and dismemberment and that the cardholder may cancel the program and obtain a full refund in the event that the cardholder is dissatisfied with the coverage.

CCB also offers its customers optional membership in its Applied Advantage program. The Applied Advantage program over time has offered a number of benefits, including eligibility for a no-cost credit line increase and convenience checks. In order to enroll in the Applied Advantage program, a potential cardholder must affirmatively check a box on the Acceptance Certificate immediately next to a statement reading: "Check here if you wish to be enrolled in

Applied Advantage for the annual membership fee of $34.95. Your credit card acceptance will be processed even if you do not choose to accept Applied Advantage. See the enclosed insert for details."

V. The Attorney General's Claims against CCB

The Attorney General asserts that CCB violated Sections 349 and 350 of the General Business Law based on the alleged inadequacy of CCB's disclosures made pursuant to TILA's and Regulation Z's requirements. The Attorney General's Petition alleges, for example, that: "[CCB] fails to disclose to consumers that the exorbitant [account origination, annual and maintenance] fees charged to the account will leave many account holders with less than $150 in available credit" and that "the terms of the secured credit card agreement, including the high interest rate, $10 monthly maintenance fee, $50 annual fee, and $30 late and over-the-limit fees are inconspicuously buried on the fifth page of the advertisement and application in the 'Terms and Conditions' chart and not otherwise referred to in the advertisement and application."

The Petition further alleges inadequate disclosure of the terms of services offered by CCB in its credit card solicitations: "The [insurance] program's exclusions pertaining to New York consumers are not conspicuously disclosed, but rather are set forth in fine print on the last page of the application, and are difficult and confusing to read." "The 60-day cancellation provision, which enables consumers to avoid the automatic

renewal of their [Applied Advantage] membership, is not always clearly and conspicuously disclosed and often appears in miniscule print towards the end of the solicitation."

In an Affirmation filed in support of the Petition, the Assistant Attorney General similarly criticized CCB's disclosures for not containing sufficient information. In his Reply Affirmation, he stated that:

> [N]either the card carrier nor the cardholder agreement actually disclose that the consumer's credit limit will, upon activation of the account, be reduced by the amount of the Account Origination Fee and Annual Fee, or that most consumers will have less than $250 in available credit. Rather, the cardholder agreement merely states—in difficult to find or read small print size—that the $100 Account Origination Fee will be charged to the account in the same manner as any other finance charge, and that the $50 Annual Fee will be treated as a "purchase."

The trial court's discussion of the Attorney General's claims also focused on the insufficiency of CCB's disclosures. The trial court observed that the Attorney General "contends that CCB's credit card offers violate New York consumer protection laws because the qualification and disclaimer disclosures are not sufficiently prominent to avoid deceiving consumers." The trial court noted:

> [The Attorney General's] argument is that you disclose all this stuff, but the manner in which you disclose it, where you put pre-approved in big, bold letters and then up to $2500 credit line, more prominent but less bold letters, and somewhere in the back talk about other things, that that's deceptive and misleading to the average reasonable consumer. That's what he is contending. He is not contending that the TILA requirements aren't met here.

REASONS WHY CERTIORARI SHOULD BE GRANTED

The Court of Appeals refused to follow the fundamental constitutional principle reaffirmed by this Court in *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008). The Court of Appeals disregarded the plain language of Section 1610(e) of TILA, and effectively converted Section 1610(e) into a conflicts preemption clause (and thus totally redundant of Section 1610(a) of TILA). Contrary to the Court of Appeals' holding, when it enacted Section 1610(e), Congress expressly preempted the States' right to impose additional disclosure requirements for credit card solicitations. TILA's legislative history and the Federal Reserve Bank's interpretation confirm that the preemption mandated by Section 1610(e) is total.

Absent review by this Court, the Court of Appeals' decision will destroy the regulatory uniformity that Congress mandated in 1988 when it amended TILA and preempted all state laws

regarding the disclosures in credit card solicitations. If allowed to stand, the decision will enable the State of New York—and embolden the other States—to use the pretext of deceptive practices claims to balkanize the federal requirements governing the substance and manner of presentation of disclosures in credit card solicitations. Further, it will eviscerate the Federal Reserve Board's exclusive authority to determine what disclosures should (and should not) be made and how and in what form those disclosures should take.

In concluding her dissent, Judge Read stated: "In enacting Section 1610(e) Congress essentially decided that the benefits from a uniform, nationwide regime for disclosure under the aegis of the Board outweighed any loss of protection to consumers under state law. The Supremacy Clause permits Congress to make this judgment, and we are bound to honor it." (49a-50a). CCB's petition should be granted in order to prevent the harms that will be triggered from the Court of Appeals' failure to "honor" Congress' judgment.

POINT I

IN DEROGATION OF THIS COURT'S HOLDINGS, THE COURT OF APPEALS' DECISION FUNDAMENTALLY OVERRIDES AND NEGATES TILA'S TOTAL PREEMPTION OF STATE REGULATION OF CREDIT CARD SOLICITATION DISCLOSURES

The Court has clearly and frequently stated the constitutional principle that the States must

enforce the federal government's decision to occupy a field and to preempt state law. The most recent expression of that duty is *Riegel*.

The plaintiffs in *Riegel* claimed that a medical device was designed, labeled and manufactured in a manner that violated New York's common law, despite the fact that the device had been approved by the Food and Drug Administration (the "FDA"). *Id.* at 1005-06. The Court granted review to consider whether those claims were barred by the explicit preemption provision in the Medical Device Amendments of 1976 (the "MDA") to the federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 360k. The MDA expressly preempts state law requirements that (i) relate to health and safety and (ii) are "different from, or in addition to, any requirement applicable" under federal law. 21 U.S.C. § 360k(a)(1). The FDA regulation states that the MDA does not preempt "[s]tate or local requirements of general applicability." 21 C.F.R. § 808.1(d)(1) (2008). The plaintiffs in *Riegel* argued—as did the Attorney General in his *Riegel* amicus brief—that the FDA interpretive statement showed that those claims fell outside of the scope of the MDA's preemption provision. *Riegel*, 128 S. Ct. at 1010; Brief for the State of New York, *et al.* as Amici Curiae, No. 06-179, 2007 WL 2456949 at *7-8 (Aug. 27, 2007). This Court rejected that contention, and held that the MDA preempted these common law claims because they would effectively impose different or additional health and safety requirements. *Riegel*, 128 S. Ct. at 1011.

The Court's unambiguous application of the Supremacy Clause in *Riegel* should have lead the

Court of Appeals to hold that Section 1610(e) preempts the Attorney General's claims under Sections 349 and 350 of the General Business Law. Indeed, the preemption provision at issue in *Riegel* is not as broad as Section 1610(e), as it declares preemption of "only state requirements 'different from, or in addition to any requirement applicable . . . to the device under federal law." *See Riegel*, 128 S. Ct. at 1006 (quoting 21 U.S.C. § 360k(a)(1)). Section 1610(e) contains no such limitation—it provides for preemption of "any provision of the law of any State relating to the disclosure of information."

The Court of Appeals, however, affirmatively refused to follow the constitutional principles reaffirmed in *Riegel*. It justified its refusal by limiting the application of *Riegel* to just the facts arising under the MDA alone. (16a-17a) In her dissent, Judge Read highlighted the majority's fallacious reasoning and concluded that: "This is an even clearer case for preemption than *Riegel*." (47a) Judge Read stated:

> [T]he relief that the Attorney General sought (and has obtained) inevitably calls for CCB to alter the format and content of the disclosures in its credit or charge card solicitations of consumers *in New York*, thus "disrupt[ing] the federal scheme envisaged and designed by Congress to "enhance credit shopping" by requiring "more detailed and uniform" disclosure of credit information to consumers nationwide.

(48a-49a) (citing *Riegel*, 128 S. Ct at 1008) (emphasis in original). As Judge Read's analysis

makes plain, the majority's refusal to follow those principles and to enforce Section 1610(e) is a significant legal error that will have grave national consequences.

A. Congress Intended that TILA Totally Preempt State Law Regulation

The Court of Appeals incorrectly based its ruling on its view that there is a presumption against preemption. (16a-17a) In deciding whether state law is preempted by a federal statute, the Court's "sole task is to ascertain the intent of Congress." *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987); *Rosario v. Diagonal Realty, LLC*, 8 N.Y.3d 755, 763 (2007), *cert. denied*, 128 S. Ct. 1069 (2008). " '[T]he purpose of Congress is the ultimate touchstone' " in any preemption analysis. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (citations omitted). If a state action falls within the scope of an express preemption provision, it is barred, and there is no place for any "presumption", even in the context of consumer protection actions. *Rowe v. N.H. Motor Transportation Ass'n*, 128 S. Ct. 989, 998 (2008); *accord Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

Congress enacted TILA in 1968. TILA's purpose is to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. § 1601(a) (1976). TILA sets forth a variety of credit-related disclosure

requirements, which, pursuant to Congress' directive, have been implemented through "Regulation Z," 12 C.F.R. Pt. 226 (2008).

As originally enacted in 1968, TILA preempted only "inconsistent" state law, *i.e.*, it preempted only those state laws whose application would conflict with TILA's requirements. *See* 15 U.S.C. § 1610(a)(1). That preemption standard, echoed in a variety of other federal banking statutes, *e.g.*, 15 U.S.C. § 6807(a) (1999) (Gramm-Leach-Bliley Act of 1999), remains the general rule under TILA. However, as discussed below, a separate provision governing credit card solicitations was enacted in 1988.

In 1988, after a generation of experience with TILA and the development of a nationwide market for credit cards, Congress amended TILA by enacting the Fair Credit and Charge Card Disclosure Act ("FCCCDA"), Pub. L. No. 100-583, 102 Stat. 2960 (1988). The new provisions that the FCCCDA added to TILA require detailed and uniform disclosure of rates and other cost information in solicitations and applications for credit card and charge card accounts. These disclosure requirements pertain to both the substance and the manner of the disclosures. *See* 15 U.S.C. § 1632 (1988); 15 U.S.C. § 1637(c) (2005)

Congress' intent in imposing these standards was to enable consumers to understand the solicitations and to compare the terms of different credit card offers. Congress concluded that consumers could do so only if the disclosures in all credit card solicitations were uniform with respect to both the content covered and the manner of disclosure. As later stated by the Federal

Reserve Board when it amended Regulation Z to implement the FCCCDA, Congress intended that its 1988 amendments would ensure "detailed and *uniform* disclosure[s]" in such solicitations. Truth in Lending: Credit and Charge Card Disclosures, 54 Fed. Reg. 13,855, 13,855 (Apr. 6, 1989) (emphasis added).

Congress therefore enacted two related and reinforcing provisions designed to guarantee that there would be only a single and uniform set of federally imposed disclosure requirements. The first provision totally preempts state law relating to disclosure of information in a credit card solicitation or application. The second one grants exclusive regulatory authority to the Federal Reserve Board. The Court of Appeals refused to enforce these two provisions.

The FCCCDA added a new provision that expressly declares that TILA preempts all state regulation of disclosures in credit and charge card applications and solicitations. In contrast to TILA's general preemption rule in Section 1610(a)(1), this provision states:

> The provisions of subsection (c) of section 1632 of this title [which concerns the form of credit and charge card application disclosures] and subsections (c), (d), (e) and (f) of section 1637 of this title [which concerns the content of required credit and charge card application and annual fee renewal disclosures] shall *supersede any provision of the law of any State relating to the disclosure of information in any credit or charge card application or solicitation* which is sub-

> ject to the requirements of section 1637(c) of this title or any renewal notice which is subject to the requirements of section 1637(d) of this title, except that any State may employ or establish State laws for the purpose of enforcing the requirements of such sections.

15 U.S.C. § 1610(e) (emphasis added).

Simultaneously, the FCCCDA conferred on the Federal Reserve Board the authority that Congress withdrew from the States, *i.e.*, the authority to dictate all disclosure requirements in connection with credit card solicitations. *Id.* § 1637(c)(5). The FCCCDA assigned the Federal Reserve Board the exclusive task of determining both the required content and format of such disclosures: "Information required by this subchapter shall be disclosed clearly and conspicuously, in accordance with the regulations of the Board." *Id.* § 1632(a).

When Congress gives a federal agency exclusive jurisdiction to regulate a particular field, state regulations may not intrude on the regulatory scheme established by Congress. *See, e.g.*, *California v. Fed. Energy Regulatory Comm'n*, 495 U.S. 490, 506-07 (1990) (California stream flow requirements preempted because they "interfere with [FERC's] comprehensive planning authority . . . ." (citations omitted)); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988) ("When a state regulation 'affects the ability of [FERC] to regulate comprehensively . . . the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act' or presents

the 'prospect of interference with the federal regulatory power,' then the state law may be preempted even though 'collision between the state and federal regulation may not be an inevitable consequence.'" (quoting *N. Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 91-92 (1963))).

B. TILA Preempts the Entire Field of Credit Card Solicitation Disclosure Requirements

The Court of Appeals fundamentally misconstrued Section 1610(e) to limit its application to only state actions creating a conflict with TILA's substantive disclosure requirements, thus rendering it wholly redundant of Section 1610(a)(1).

Unlike Section 1610(a)(1), Section 1610(e) is not a "conflict" preemption clause. It expressly provides that TILA "supersedes *any provision* of the law of any State *relating to* the disclosure of information in any credit or charge card application or solicitation . . . ." 15 U.S.C. § 1610(e) (1994) (emphasis added). Similarly, Regulation Z reiterates the "Special rule for credit and charge cards" with respect to preemption:

> State law requirements *relating to the disclosure of credit information in any credit or charge card application or solicitation* that is subject to the requirements of section 127(c) of chapter 2 of the act (§ 226.5a of the regulation) . . . *are preempted*. State laws relating to the enforcement of section 127(c) and (d) are not preempted.

12 C.F.R. § 226.28(d) (2008) (emphasis added).

The Court of Appeals refused to abide by this Court's decisions that have repeatedly held that the phrase "relating to" in preemption clauses is to be given its broad meaning.

> For purposes of the present case, the key phrase, obviously, is "relating to." The ordinary meaning of these words is a broad one—"to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with," Black's Law Dictionary 1158 (5th ed. 1979)—and the words thus express a broad pre-emptive purpose.

Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383 (1992); *accord Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 146 (2001); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137-38 (1990); *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990); *Pilot Life Ins. Co. v. Dedaux*, 481 U.S. 41, 47 (1987). Section 1610(e) must therefore be read to preempt all state laws and actions having "*a connection with, or reference to*" the disclosure of information in credit card solicitations. *See Rowe*, 128 S. Ct. at 995 (emphasis in original; quoting *Morales*, 504 U.S. at 384).

Regulation Z also makes clear that State laws, such as Sections 349 and 350 of the General Business Law, may be used in connection with credit card solicitation disclosures only to help enforce TILA's own requirements—but not to expand, supplement or modify TILA's requirements. As explained in the Federal Reserve Board's Official Staff Interpretations of Regulation Z (the "Commentary"):

> The standard that applies to preemption of state laws as they affect transactions of this type subject to §§ 226.5a and 226.9(e) *differs from the preemption standards generally applicable under the Truth in Lending Act*. The Fair Credit and Charge Card Disclosure Act [section 1610(e)] *fully preempts state laws relating to the disclosure of credit information in consumer credit or charge card applications or solicitations.*

12 C.F.R. pt. 226, Supp. I (2008) (emphasis added). In other words, any state law that either directly or indirectly has the effect of regulating such disclosures is of no force or effect. The Commentary dispositively illustrates the scope of preemption:

> For example, a state law requiring disclosure of credit terms in direct mail solicitations for consumer credit card accounts is preempted. A state law requiring disclosures in telephone applications for consumer credit card accounts also is preempted, even if it applies to applications initiated by the consumer rather than the issuer *because the state law relates to the disclosure of credit information in applications or solicitations within the general field of preemption, that is, consumer credit and charge cards.*

Id. (emphasis added).

The Court of Appeals misread the Commentary. According to the Court of Appeals, use of

state deceptive trade practices laws for any purpose is exempted from preemption under Section 1610(e). (10a) This reading, however, conflicts with the plain language of Section 1610(e), Regulation Z and the totality of the Commentary. Just before the passage on which the Court of Appeals relies (10a), the Commentary states that TILA "fully preempts state laws relating to the disclosure of credit information in consumer credit or charge card applications or solicitations." 12 C.F.R. Part 226, Supp. I at 493 (2007 ed.). The Commentary then observes: "For example, a state law requiring disclosure of credit terms in direct mail solicitations for consumer credit card accounts is preempted." *Id.* Likewise, the Federal Register Notice publishing the Commentary states: "State laws relating to the terms of credit required to be disclosed or the manner in which such terms must be disclosed are preempted as to any credit or charge card application or solicitation that is subject to 127(c) . . . . The preemption of such provisions of state law is *total* . . . ." Truth in Lending: Credit and Charge Card Disclosures, 54 Fed. Reg. 13855, 13863 (Apr. 6, 1989) (emphasis added). Just as was the case in *Riegel* with respect to the MDA, the Commentary interpreting TILA, when read in its plain context, confirms that use of state deceptive trade practices laws are preempted except when they are used solely to enforce the requirements imposed by TILA and Regulation Z. *See Riegel*, 128 S. Ct. at 1010-11.

The Court of Appeals also wrongly concluded that, when the Federal Reserve Board has not mandated a particular disclosure, the States to

are free to supplement TILA's requirements until such time as the Federal Reserve Board, in fact, does act. In her dissent, Judge Read identified the flaw in that reasoning:

> The majority's contrary statutory interpretation produces a patchwork scheme whereby each state may effect different or additional credit disclosures unless and until the Board acts pursuant to section 1637(c)(5) to regulate the form or substance of disclosure of the same item of credit information, which would perforce then become "information . . . which is subject to section 1637(c)." This, of course, completely undermines the uniformity of the federal regime that Congress devised to govern a nation-wide industry. Moreover, it leaves no room for the possibility that the Board may have policy reasons *not* to mandate a particular disclosure that a state considers to be warranted.

(39a-40a) (citing *Ark. Elec. Coop. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (footnote omitted, emphasis and ellipsis in original)).[4]

---

[4] The Federal Reserve Board proved Judge Read's point and asserted its exclusive authority in the area in 2007 and 2008, when it proposed and adopted regulations requiring for the first time, on a prospective basis, disclosures of the very type that the Attorney General alleged that CCB had failed to make. *See* Truth in Lending, 72 Fed. Reg. 32948 (June 14, 2007); Truth in Lending, 73 Fed. Reg. 28866 (May 19, 2008).

POINT II

THE COURT OF APPEALS' DECISION WILL DESTROY THE NATIONAL UNIFORMITY ESTABLISHED BY TILA

The importance of uniform nationwide regulation in banking was highlighted by the Court in *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007). Although *Watters* involved only national banks and their operating subsidiaries, the Court emphasized the principles underlying the long-standing history of preemption in the area of banking regulation. *Id.* at 1566-67 (discussing the benefits of exclusive federal regulation for the efficient exercise of bank powers). In *Watters*, those principles led to the conclusion that the state law was preempted, despite the lack of any express statutory provision addressing the particular preemption at issue. *Id.* at 1568-69. Here, since there is an express mandate that state law is preempted, that conclusion is even more compelling.

In the FCCCDA, Congress expressly preempted the entire field of state regulation of credit card solicitation disclosures. "Congress left no room for the States to supplement" TILA's requirements with respect to credit card solicitation disclosures. Thus, a State may not pursue an action for inadequate or insufficient disclosures, such as the Court of Appeals has allowed the Attorney General to do here. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Judge Read reviewed the cacophony of state regulation of credit card disclosures prior to the

enactment of the FCCDA in 1988, pointing out that at least eleven states had separately regulated the field. She noted: "This time, Congress tackled preemption head on, devising a 'special' rule for disclosure of credit information in credit or charge card applications or solicitations, which 'depart[ed] radically from' the inconsistency standard, 'the approach which Congress historically [had] adopted in the credit disclosure area.'" (37a) (citing Joseph W. Gelb & Peter N. Cubita, *The Fair Credit and Charge Card Disclosure Act of 1988: A Federal Alternative to the Rate Ceiling Approach*, 44 Bus. Law. 941, 955 (1988-1989)).

The legislative history of the FCCDA corroborates Judge Read's observations. Congress wanted to enable consumers to understand the solicitations that they receive and to be able to compare the terms of different credit card offers. Congress concluded that this objective could be achieved only if the disclosures were uniform with respect to both the content covered and the manner of disclosure.[5]

---

[5] The House debate on the FCCCDA conference report leaves no doubt about Congress' belief that uniformity would contribute to the goal of consumer understanding. For example, Representative Barnard stated: "It is a bill requiring comprehensive fair, simple and uniform disclosure of the basic terms of credit cards . . . . If these terms are disclosed conspicuously in the same manner and location according to the type of application or solicitation, as provided by [this bill], then consumers can choose the card and combination of terms best for them." 134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988). Similarly, Representative Hiler stated: "[The FCCCDA] adopts a single uniform federal standard that will greatly assist consumers in comparison shopping between credit card programs." *Id.*

Congress understood the necessity of the preemption provision in Section 1610(e) in order to effectuate its goal of national uniform regulation of the disclosure requirements. During the House debate, Representative Schumer explained its importance:

> The second issue on preemption is that credit cards, unlike mortgages, or auto loans, or home loans, are indeed a national industry. The large issuers control a lot of the market. If they are willing to go for tough disclosure, provided that they do not have to make different types of disclosure in each of the 50 States, that to me is a trade that benefits consumers, and it is a trade that ought to be made.

134 Cong. Rec. H10179-02, 1988 WL 181188 (Oct. 13, 1988).

The Court of Appeals' decision will destroy the uniformity established by Section 1610(e) and will reinstate the chaotic situation that existed before enactment of the FCCDA, when a regulation under TILA was protected only by the conflict preemption clause in Section 1610(a)(1). Indeed, the threat of multiple and different regulatory requirements in each of the fifty states will be unbridled. Virtually every state has a false and deceptive practices statute similar to Section 349 and 350 of the General Business Law.[6] Absent this Court's intervention, the

---

[6] More than 80 percent of the States have such laws. *See* Jonathan A. Sheldon, *Unfair and Deceptive Acts and Practices*, App. A (6th ed. 2004).

States will be empowered to challenge the adequacy of the form and manner of the disclosures required under Regulation Z and to impose their own supplemental and inconsistent requirements.

The Court of Appeals' decision establishes the foundation for a completely balkanized system of regulation, thereby undermining the very benefits provided to consumers of a nationwide uniform system of disclosures and subjecting financial institutions to inconsistent and multiple burdens depending on the State to which the credit card solicitations are being mailed. The whole purpose of preemption, particularly in light of the history underlying the enactment of Section 1610(e), is to prevent those adverse consequences. *See State Farm Bank, FSB v. Reardon*, 539 F.3d 336, 348 (6th Cir. 2008) ("Were this Court to agree with the Superintendent that the Ohio Act may be applied to State Farm Bank exclusive agents, we would be opening the door to subjecting State Farm Bank and its exclusive agents to fifty separate and distinct licensing and regulatory schemes, all with their own requirements and procedural hurdles. Subjecting State Farm Bank and its exclusive agents to such a veritable 'hodgepodge' of state regulation would not only be unduly burdensome, it would also be at odds with the very purpose behind federal regulation of federal savings associations.").

CCB's petition should be granted in order to enforce the plain language of Section 1610(e) preempting all state regulation of credit card solicitation disclosures and to prevent the destruction

of a national uniform system that Congress deliberately created.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Dated: September 23, 2008

Respectfully submitted,

HOWARD N. CAYNE
Counsel of Record
NANCY L. PERKINS
ARNOLD & PORTER LLP
555 Twelfth Street, N.W.
Washington, DC 20004
(202) 942-5000

H. PETER HAVELES, JR.
ARNOLD & PORTER LLP
399 Park Avenue
New York, New York 10022
(212) 715-1000

Attorneys for Petitioner

APPENDIX

Nos. 3, 96

IN THE MATTER OF THE PEOPLE OF THE STATE OF NEW YORK, BY ELIOT SPITZER, AS ATTORNEY GENERAL,

Respondent-Appellant,

—v.—

APPLIED CARD SYSTEMS, INC., *et al.*,

Appellants-Respondents.

H. Peter Haveles, Jr., for *appellants-respondents*.
Michelle Aronowitz, for *respondent-appellant*.
Attorney General of the State of Vermont, et al., *amici curiae*.

CIPARICK, J.:

This appeal arises out of a special proceeding initiated by the Attorney General, seeking restitution, civil penalties, and injunctive relief for violations of New York's Executive Law and Consumer Protection Act (*see* Executive Law § 63 (12), General Business Law §§ 349, 350). We are asked to determine whether the federal Truth-in-Lending Act (TILA) preempts these claims of a fraudulent and deceptive credit card solicitation scheme. We conclude that it does not. We hold, however, that res judicata effect should be

granted to a prior nationwide class action settlement agreement, thereby precluding the Attorney General from recovering certain restitution.

I.

Respondent Cross Country Bank (CCB) is a Delaware Bank that, since 1997, has actively solicited consumers in the "sub-prime" credit market to apply for its credit cards. These consumers "generally would not qualify for credit under traditional underwriting guidelines and principles."[1] Certain of CCB's marketing materials claim that the company's "purpose is to help people establish good credit." Respondent Applied Card Systems (ACS) provided, as relevant here, debt collection services for CCB's credit card accounts.

On March 28, 2003, the Attorney General filed a Verified Petition asserting that CCB's credit card solicitations and collections practices violated New York's Executive Law and Consumer Protection Act (*see* Executive Law § 63 [12] [fraud], General Business Law §§ 349 [deceptive business practices] and 350 [false advertising]). The gravamen of the petitioner's complaint was that CCB had misrepresented the credit limits that sub-prime consumers could obtain and that it failed to disclose the effect that its origination and annual fees would have on the amount of initially available credit.

---

[1] CCB also solicits consumers who have yet to establish a credit history.

For example, in its mail solicitations CCB told consumers that they were "pre-approved" for a credit limit "up to" $2,500 or $1,000. These communications further clarified that the actually-approved credit limit could be substantially less, perhaps as low as $350.[2] CCB's solicitations also explained that upon approval consumers would incur an $100 "Account Origination Fee" and a $50 "Annual Fee." But CCB's explanation of the fact that those fees would be treated as charges that could greatly reduce the amount of credit initially available to consumers were oblique.[3] In some cases, the initial fees depleted consumers' credit limits by approximately 40% or more.

As relevant here, the Verified Petition also contained allegations of fraud and deception pertaining to CCB's marketing of "secured cards," the Credit Account Protector (CAP) insurance program, the Applied Advantage (AA) cardholder benefit program, and a debt collection device known as "re-aging." With respect to secured

---

[2] In some of its solicitations, CCB also explained that "historically," the average approved credit limit was $400.

[3] For example, in one of its mail solicitations, CCB described the origination fee as a "one-time" charge. Further, near the bottom of the first page of CCB's "Credit Card Agreement," the company stated:

> "**Our Charges**. You agree to pay us the following fees in connection with your Account. Such fees will be treated as Purchases on your Account . . .
>
> **1. Annual Fee.** Your account is subject to an Annual Fee and it will be imposed when your Account is approved and in the same billing cycle each following year."

cards,[4] petitioner asserted that CCB's advertisement was deceptive because its banner touted "no late fees*" and "no collections calls*," but further clarified that such fees would be imposed and such calls made in certain instances. The marketing of CAP was fraudulent and deceptive, petitioner claimed, because the program was advertised as providing coverage in the event of "death, disability, unemployment, or family leave," but—as CCB clarified in an insert and subsequently-mailed certificate of coverage—only life and dismemberment benefits were available to New York consumers.[5] As for AA, petitioner asserted that CCB's practice of automatically enrolling consumers in the benefit program—at a cost of $34.95 per year—unless they expressly opted-out of it was deceptive because the opt-out mechanism was confusing and misleading. Finally, petitioner alleged that ACS marketed re-aging as a means for severely delinquent cardholders to bring their accounts current through a series of payments, while failing to explain that

[4] Such cards were "secured" by funds on deposit in savings accounts maintained by CCB. Secured cards' credit limits corresponded to the amount of funds on deposit in those accounts. According to the Verified Petition, those limits were reduced by a $50 account origination fee and a $10 monthly maintenance fee. And, like its other credit cards, CCB's secured cards were subject to monthly $30 late and over-the-limit fees.

[5] Petitioner further claimed that CCB's solicitations deceptively positioned the CAP authorization signature line in close proximity to the line that consumers were required to sign to accept CCB's credit card offer.

over-the-limit fees would continue to accrue throughout the re-aging process and that both these fees and the previously imposed late fees would be due at the conclusion of the re-aging process.[6]

In addition to the alleged fraudulent and deceptive practices described above, the Verified Petition also set forth certain facts regarding respondents' late fees, finance charges, balance calculation method, and the lack of any "grace period" for consumer payments. Pursuant to TILA, these terms must be disclosed in all credit card solicitations. But petitioner claimed that many consumers were "unaware" of the manner in which charges and penalties based upon the terms were assessed to their accounts.[7] According to petitioner, these charges and penalties contributed to "trapp[ing] . . . unwary consumers" in a "vicious cycle of pyramiding debt."

On February 11, 2004, Supreme Court issued a Decision and Order that, in relevant part, held that petitioner was barred by res judicata from seeking restitution for pre-January 1, 2002 "front-end claims," or those concerning illegal conduct "at or near the inception of the card-

---

[6] Re-aging refers to a federally-regulated process through which credit card companies enter into agreements with delinquent card holders to avoid "charging-off" such accounts due to persistent non-payment (*see* 65 Fed Reg 36903, 36903 [2000]).

[7] With respect to CCB's secured card advertisement, petitioner asserted that the late and over-the-limit fee information was "buried" in the application and its Terms and Conditions chart.

holder relationship," on behalf of New York consumers who had opted to accept the benefits of a nationwide class action settlement with CCB.[8] The California Superior Court approved the settlement and dismissal of the action with prejudice on September 30, 2002 (*see Allec v Cross Country Bank*, No. 802894, Final Judgment and Order of Dismissal with Prejudice [Sept. 30, 2002]).

In their motion to reargue the February 11 Order, respondents asserted that the credit card application and solicitation disclosure requirements set forth in TILA (*see* 15 USC §§ 1632 [c], 1637 [c], [e], [f]) and its accompanying regulation, Regulation Z (12 CFR Part 226), preempted petitioner's claims. Following oral argument, Supreme Court held that the claims were not preempted.

After issuing its preemption decision, the court proceeded to find "as a matter of law and fact" that CCB had "repeatedly and persistently" engaged in fraud, deception and false advertising in connection with its credit card solicitations, and that ACS's marketing of the re-aging process was similarly illegal. These rulings were based on the court's review of "volumes of evidentiary proof," including more than 100 pages of application and solicitation materials, more than 200 consumer complaints and affidavits, and the affidavits of former ACS collection employees.

On June 24, 2004, Supreme Court issued an Order that, as relevant here, "permanently enjoined"

[8] Of the New York members of the *Allec* class, only 12 chose not to accept the settlement's benefits.

respondents from engaging in future fraud, deception, and false advertising with respect to: credit limits, initially-available credit, late fees and collection calls concerning secured credit card accounts, benefits available under CAP, and the benefits of account repayment plans, such as re-aging. Supreme Court also prohibited respondents from automatically enrolling consumers in AA without express authorization. The Appellate Division affirmed, rejecting respondents' preemption argument (*see* 27 AD3d 104, 109 [2005]). On January 19, 2006, Supreme Court entered an Order awarding the Attorney General approximately $1.3 million in restitution and damages, $7.9 million in penalties and $2,000 in costs. In part, restitution was based upon costs incurred by virtue of the origination and annual fees as well as certain late and over-the-limit fees.

The Appellate Division modified. Upholding Supreme Court's res judicata ruling, the court held that the "public interest does not justify giving New York consumers bound by the *Allec* settlement two chances to receive make-whole relief" (41 AD3d 4, 8 [2007] [internal quotation and alteration omitted]). As to respondents' appeal, the court held that Supreme Court's award of restitution for petitioner's CAP and re-aging claims was improper. Finally, the court affirmed each of the penalties assessed.

This Court granted respondents leave to appeal and we now affirm.

II.

Under the U.S. Constitution's Supremacy Clause (U.S. Const. art. VI, cl. 2.), the purpose of our preemption analysis is singular and straightforward. "[O]ur sole task is to ascertain the intent of Congress" (*Cal. Sav. & Loan Ass'n v Guerra*, 479 US 272, 280 [1987]; *Rosario v Diagonal Realty LLC*, 8 NY3d 755, 763 [2007]; *see also Medtronic, Inc. v Lohr*, 518 US 470, 485 [1996] ["[T]he purpose of Congress is the ultimate touch-stone in every pre-emption case"] [internal quotation omitted]). Preemption can arise by: (i) express statutory provision, (ii) implication, or (iii) an irreconcilable conflict between federal and state law (*see Balbuena v IDR Realty LLC*, 6 NY3d 338, 356 [2006]).

When dealing with an express preemption provision, as we do here, it is unnecessary to consider the applicability of the doctrines of implied or conflict preemption (*see Cipollone v Liggett Group*, 505 US 504, 517 [1992] [majority op] [statute's preemptive scope is "governed entirely" by its "express language"]). Instead, the resolution in this case turns solely upon proper statutory construction of TILA's credit card application and solicitation preemption provision (*see Matter of Frew Run Gravel Prods. v Town of Carroll*, 71 NY2d 126, 131 [1987]). In undertaking that task, we are guided by the "starting presumption that Congress does not intend to supplant state law" unless its intent to do so is "clear and manifest" (*New York State Conf. of Blue Cross & Blue Shield Plans v Travelers Ins. Co.*, 514 US 645,

654 [1995]; *Lohr*, 518 US at 485; *accord Balbuena*, 6 NY3d at 356).

The preemption provision at issue here was enacted as part of the Fair Credit and Charge Card Disclosure Act of 1988 (FCCCDA), which amended TILA.[9] It states:

> **"(e) Certain credit and charge card application and solicitation disclosure provisions**
>
> The provisions of subsection (c) of section 1632 of this title and subsections (c), (d), (e), and (f) of section 1637 of this title shall supersede any provision of the law of any State relating to the disclosure of information in any credit or charge card application or solicitation which is subject to the requirements of section 1637(c) of this title or any renewal notice which is subject to the requirements of section 1637(d) of this title, except that any State may employ or establish State laws for the purpose of enforcing the requirements of such sections" (15 USC § 1610 [e]).

---

[9] Since its enactment in 1968, TILA has also contained another preemption provision (*see* 15 USC § 1610 [a] [1]). In contrast to 15 USC § 1610 (e), that provision preempts state laws "relating to the disclosure of information in connection with credit transactions," only to the extent of their inconsistency with TILA or Regulation Z (*see* 15 USC § 1610 [a] [1]; *see also* Clontz & Pannabecker, Truth-In-Lending Manual: Text and Forms ¶ 2.03 [4] [2007 ed]).

Respondents repeatedly assert that section 1610 (e) expressly preempts "any and every state law 'relating to the disclosure of information in any credit or charge card application or solicitation.'" Petitioner counters that its claims are not preempted because they do not relate to the disclosure of credit information, but rather to affirmative deception. Based upon the statutory text, legislative history, and administrative interpretation of section 1610 (e), we agree with petitioner.

Section 1610 (e) does not preempt every state law that could potentially touch upon any credit information that respondents might choose to include in their credit card applications and solicitations. Instead it preempts those state laws that relate to "disclosure of information," in credit card applications and solicitations "subject to the requirements of section 1637(c)," not those that prevent fraud, deception and false advertising. Preemption is limited, then, to laws that purport to alter the format, content, and manner of the TILA-required disclosures and those that require credit issuers to affirmatively disclose specific credit term information not embraced by TILA or Regulation Z (*see* 15 USC §§ 1610 [e], 1637 [c] [5], *see also* 54 Fed Reg 13855, 13863 ["State laws relating to the terms of credit required to be disclosed or the manner in which such terms must be disclosed are preempted"]; 12 CFR Part 226, Supp I, 28 (d) (1) [Jan. 14, 2008] [explaining that state laws are preempted when they require the disclosure of credit terms]).

Neither aspect of such preemption is present in this case. This is because New York's Executive

Law and Consumer Practice Act, collectively, do not require respondents to disclose anything. These statutes simply require that they refrain from fraud, deception, and false advertising when communicating with New York consumers.

The misleading statements in respondents' applications and solicitations regarding potential credit limits, initially-available credit, secured card benefits, credit insurance coverage, re-aging benefits, and their deceptive automatic enrollment of consumers in the AA program do not constitute the disclosure of any information "which is subject to the requirements of 1637(c)" (*see* 15 USC 1610 [e]).[10] The only information in a credit card application or solicitation that must be disclosed pursuant to section 1637 (c) is that

---

[10] Petitioner's claims also do not concern the tabular format of certain TILA disclosures, disclosures in renewal notices, disclosures of percentages used to determine fees, or the disclosure of the range of fees applicable in different states. Accordingly, these claims do not implicate section 1632 (c) or subsections (d), (e), or (f) of section 1637, which are referenced at the beginning of the preemption clause at issue here (*see* 15 USC §§ 1632 [c] [1] [requiring presentation of "the information described in paragraphs (1)(A), (3)(B)(i)(I), (4)(A), and (4)(C)(i)(I) of section 1637 (c)" to be set forth in a tabular format, commonly known as the "Schumer Box" after FCCCDA's House-sponsor, then-Representative Charles Schumer (N.Y.), 15 USC § 1637 [d] [1] [B] [requiring disclosure in renewal statement of "the information described in subsection (c)(1)(A) or (c)(4)(A)"], 1637 [e] [requiring disclosure of percentage and amount used to determine "any fee required to be disclosed under subsection (c) or (d)"], 1637 [f] [permitting disclosure of range of fees "required to be disclosed . . . under [certain subparagraphs] of subsection (c)"]).

describing: (i) annual percentage rate, including whether such rate is variable (ii) annual and other periodic fees, including, "membership fees imposed for the issuance or availability of a credit card," (iii) minimum finance and transaction charges, (iv) grace period, (v) balance calculation method, (vi) cash advance fee, (vii) late fee, (viii) over-the-limit fee, and (ix) a statement that charges incurred are due when a periodic statement is received (*see* 15 USC § 1637 [c] [1] [A] [I] - [B] [iii]; 15 USC § 1637 [c] [2] [mandating, with certain exceptions, disclosure of information described in 1637 (c) (1) (A), in telephone solicitations]; 12 CFR § 226.5a [b]). Pursuant to 15 USC § 1637 (c) (5), however, the Federal Reserve Board of Governors (the Board) has authority to enact regulations requiring "the disclosure of information in addition to" that described in section 1637 (c).

The Verified Petition does make reference to the fact that many consumers were "unaware" of the manner in which certain credit terms, including late and over-the-limit fees, balance calculation method, and the lack of any grace period, were applied against their accounts. But petitioner "takes no issue" with the substance or sufficiency of respondents' TILA disclosures and he has obtained no relief based upon consumers' purported lack of awareness. As we previously have held, the mere fact that a complaint makes reference to certain matters that are preempted by a federal statute does not "transform" a state law action into one that is preempted under fed-

eral law (*see Nealy v US Healthcare HMO*, 93 NY2d 209, 220-221 [1999]).[11]

Respondents argue, however, that the statutory text compels us to conclude that section 1610 (e) bars the Attorney General's claims. Their textual argument is based primarily upon the purportedly settled construction of the phrase "relating to" in U.S. Supreme Court precedent.

The U.S. Supreme Court's interpretation of the phrase "relating to," does not help respondents. When construing other statutes, the Court has concluded that the phrase has a meaning that "express[es] a broad pre-emptive purpose" (*see Morales v Trans World Airlines, Inc.*, 504 US 374, 383 [1992]; *accord Rowe v N.H. Motor Transp. Assn.*, ___ US ___, 128 S Ct 989, 994 [2008]). It has been defined as "having a connection with, or reference to" the subject-matter set forth in a particular preemption clause (*see Morales*, 504 US at 384). But the Court has made clear that the scope of its interpretation of "relating to" is subject to some limitation. This is because "[i]f 'relate to' were taken to extend to the furthest stretch of indeterminancy, then for all practical purposes pre-emption would never run its course" (*Travelers*, 514 US at 655). Thus, the U.S. Supreme Court has "cautioned against an 'uncritical literalism' that would make pre-

[11] This case does not present the question whether a New York Executive Law or Consumer Protection Act claim seeking relief based upon specific 1637 (c) disclosures would be preempted. Accordingly, we offer no opinion upon the propriety of such a claim.

emption turn on 'infinite connections' " (*Egelhoff v Egelhoff*, 532 US 141, 147 [2001], *quoting Travelers*, 514 US at 656).

We applied these principles in *Nealy* to conclude that even when a complaint refers to matters preempted under federal law, no preemption occurs if the effect of the relief sought upon the federal scheme is " 'too tenuous, remote or peripheral' " (*Nealy*, 93 NY2d at 220, *quoting Shaw v Delta Air Lines, Inc.*, 463 US 85, 100 n 21 [1983]). We hold this rule of limitation to be applicable here. Quite simply, petitioner's claims do not relate to the disclosure of federally-mandated information in credit card applications or solicitations. Instead, they relate to the inclusion in those materials of certain fraudulent and deceptive misinformation—none of which is even addressed by the federal disclosure scheme.

The preemption clause at issue here is very different from that in *Morales*, a case that respondents' textual argument hinges upon. There, the Airline Deregulation Act of 1978 (ADA) preempted "any law 'relating to rates, routes, or services' of any air carrier' " (*Morales*, 504 US at 378-379 [quoting 49 USC § 1305 [a] [1]). Based on the comprehensive preemptive intent evidenced in this provision, the Court had little trouble concluding that a set of purportedly enforceable guidelines adopted by the National Association of Attorneys General, which described in excruciating detail the "content and format" of airline advertising, frequent flyer programs, and passenger compensation policies, was preempted (*see Morales*, 504 US at 388, 390-414; *see also Am. Airlines v Wolens*, 513 US 219, 227-228 [1995]

[preemptive provision in ADA bars claims under Illinois's Consumer Fraud Act]; *Air Transp. Assoc. of Am., Inc. v Cuomo*, 520 F3d 218, 223 [2d Cir 2008] [ADA preempts New York's Passenger Bill of Rights because that statute requires airlines to provide certain amenities to travelers and therefore relates to "the service of an air carrier"]). But the reach of section 1610 (e) is not as expansive as that of the ADA preemption provision at issue in *Morales*.

Section 1610 (e) preempts only those state laws that relate to the format, content, manner, or substance of the TILA-required disclosures. Thus, there is no preemption here because neither petitioner's claims nor the relief it was granted below have any effect upon those disclosures (*see Nealy*, 93 NY2d at 220 [no preemption where "[p]laintiff's claims do not bind an employee plan to any particular choice of benefits, do not dictate the administration of such a plan and do not interfere with a uniform administrative scheme"]; *see also Harvey v Members Empls. Trust for Retail Outlets*, 96 NY2d 99, 106 [2001] [state insurance law and regulation relate to an ERISA plan because they "impose a basic benefit structure"]). To the contrary, Supreme Court's affirmed Orders did not mandate any alteration of or addition to the required section 1637 (c) disclosures. Rather, its injunction simply prevents respondents from affirmatively misrepresenting the nature of credit terms that, at present, are not even subject to regulation under TILA or Regulation Z. Indeed, petitioner's entitlement to the relief granted below exists wholly apart from respondents' section 1637 (c) disclo-

sure obligations; it is based upon "a more general obligation—the duty not to deceive" (*see Cipollone*, 505 US at 528-529 [plurality opinion]).

But respondents maintain that Congress's intent to create a uniform system of disclosure in credit card applications and solicitations militates in favor of preemption. We again emphasize, however, that petitioner's success in this case does not force respondents to make any alterations to their section 1637 (c) disclosures or to affirmatively disclose any additional credit terms. This is dispositive. In any event, the sort of "indirect economic influence" upon respondents' solicitations practices resulting from the relief accorded below is not sufficient to overcome the presumption against preemption of state law (*see Travelers*, 514 US at 664 [although ERISA contains a broad, "relating to," preemption clause New York law imposing surcharges on all insurers was not preempted because the law "d[id] not impose [a] . . . substantive coverage requirement"]; *accord Nealy*, 93 NY2d at 220).

We acknowledge that the U.S. Supreme Court recently reiterated that state tort judgments impose substantive requirements that "can be . . . a potent method of governing conduct and controlling policy" (*see Riegel v Medtronic, Inc.*, 552 US ___, 128 S Ct 999, 1008 [2008] [internal quotation omitted]). But *Reigel* is not controlling here for two reasons. First, the Medical Device Act preemption provision at issue there is substantively different from 15 USC § 1610 (e). It preempted "state requirements different from, or in addition to, any requirement applicable to . . . [a medical] device under federal law" (*see id.* at

1006, *quoting* 42 USC § 360k (a) (1)]). The scope of section 1610 (e) preemption is, however, expressly limited to state laws relating to the disclosures specifically required under section 1637 (c), it does not extend to the additional state requirement that respondent must refrain from fraud and deception when making statements about credit terms that are not even within the scope of TILA or Regulation Z.

Second, unlike the tort law claims in *Reigel*, the Attorney General's success in this action will not "disrupt[ ] the federal scheme" of disclosure mandated under TILA (*see* 128 S Ct at 1008). Petitioner has not sought relief based upon the TILA-required disclosures. Nor has he sought to alter the format, content, or manner of those disclosures. The relief granted below does not impose any additional disclosure requirements upon respondents, it merely precludes them from making fraudulent and deceptive statements regarding certain credit terms (*compare Riegel*, 128 S Ct at 1008 [state tort law claim preempted because FDA's exacting standards for pre-market approval of medical devices would be disrupted by judgment "that requires a manufacturer's catheters to be safer, but hence less effective, than the model the FDA has approved"]).

Respondents' disruption argument assumes that Congress intended the TILA disclosures to provide consumers' sole protection against credit card companies' fraudulent and deceptive marketing practices. But the qualified nature of the preemption provision's text belies that sweeping assertion, as does the statute's legislative history.

The FCCCDA's House Conference Report states that section 1610 (e) preempts "State credit and charge card disclosure laws" (*see* HR Conf Rep No. 100-1069, 100th Cong, 2d Sess, at 22, reprinted in 1988 US Code Cong & Admin News, at 3960). An example of such a law is California's Areias Credit Card Full Disclosure Act of 1986, which contains application and solicitation disclosure requirements very similar to TILA's (*see* Cal. Civ. Code §§ 1748.10-.12; Furletti, Comment, *The Debate Over the National Bank Act and the Preemption of State Efforts to Regulate Credit Cards*, 77 Temp. L. Rev. 425, 451 & n 233 [2004]; *see also* Wis. Stat. Ann. § 422.308 [requiring that "every application for an open end credit plan" shall set forth certain specific information, including "the annual percentage rate"]).[12] Although the Senate's version of FCCCDA would have saved provisions of such state laws that required disclosure of information in addition to that set forth in section 1637 (c) from preemption if they were reenacted within two years of the Act's passage (*see* S Rep No. 100-259, 100th Cong, 1st Sess, at 9-10, reprinted in 1987 US Code Cong & Admin News, at 3945-3946), the Senate compromised and "recede[d]" to the House version, which "preempted the provisions of all

[12] Like TILA, these state credit card application and solicitation laws mandated disclosure of only "selected costs associated with credit cards" (*see* Gelb and Cubita, *The Fair Credit Card Disclosure Act of 1988: A Federal Alternative to the Rate Ceiling Approach*, 44 Bus Law 941 n 1 [1988-1989] [quoting Act of Sept. 29, 1986, ch. 1397, § 1(a), reprinted in Cal. Civ. Code § 1748.10 historical note (West 1989)]).

state laws *with respect to the disclosures mandated under its bill*" (*see* HR Conf Rep No. 100-1069, 100th Cong, 2d Sess, at 21, reprinted in 1988 US Code Cong & Admin News, at 3960 [emphasis added]; *see also* Gelb and Cubita, *Credit Card Application and Solicitation Disclosure Legislation: An Alternative to the Rate Ceiling Approach*, 43 Bus Law 1557, 1564 [1988]). The Attorney General's claims in this case do not effect any of the mandated disclosures ultimately codified by the FCCCDA nor do they require respondents to make any additional affirmative disclosures regarding their credit products. Thus, this case does not concern the sort of credit card disclosure laws preempted under TILA.

Congress also made clear that, even when enforcing the TILA disclosure requirements, states could use their unfair and deceptive trade practices acts to "requir[e] or obtain[] the requirements of a specific disclosure beyond those specified in Section [1637] (c) in the settlement or adjudication of a specific case or cases" (*see* HR Conf Rep No. 100-1069, 100th Cong, 2d Sess, at 22, reprinted in 1988 US Code Cong & Admin News, at 3960).[13] In sum, the legislative record shows that Congress only

[13] The Conference Report's approval of the prospect of settlements and adjudications by which state agencies would gain the right to demand disclosures beyond those required under section 1637 (c) stands in marked contrast to the dissent's claim that Congress "wanted to cut off and fully supplant" all state regulation of credit card applications and solicitations (*see* dissenting op at 18).

intended FCCCDA to preempt a specific set of state credit card disclosure laws, not states' general unfair trade practices acts.

Even more significantly, the Senate Banking Committee Report states that TILA does not preempt "the use of State mini-Federal Trade Commission statutes to address unfair or deceptive acts or practices" (*see* S Rep No. 100-259, 100th Cong, 1st Sess, at 9, reprinted in 1987 US Code Cong & Admin News, at 3945). General Business Law §§ 349 and 350 comprise, of course, just such a "mini-FTC" act (*see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 26 [1995]; *Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314, 323-324 [2002]). The Senate Report's understanding of TILA's disclosure requirements is reflected in the Official Commentary of Federal Reserve Board of Governors, the agency charged by statute with administering TILA (*see* 12 CFR Pt 226, Supp I, 28 (d) (3) [Jan. 14, 2008] ["[S]tate laws prohibiting unfair or deceptive acts or practices concerning credit and charge card applications, solicitations and renewals are not preempted"]; 54 Fed Reg 13855, 13864 [1989] ["[A]ny prohibitions against unfair and deceptive acts or practices (such as state 'mini-FTC acts') . . . are not preempted"]). That interpretation is entitled to great deference (*see Ford Motor Credit Co. v Milhollin*, 444 US 555, 565 [1980] ["[D]eference is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z. Unless demonstrably irrational, Federal Reserve Board staff opinions

construing the Act or Regulation should be dispositive"]).[14]

[14] That the Board has recently proposed certain amendments to Regulation Z that would require credit card issuers to disclose in their applications or solicitations the effect of "fees or a security deposit" upon an applicant's credit limit, if such fees "are 25 percent or more of the minimum credit limit offered for the account" (*see* 72 Fed Reg 32948, 32954 [June 14, 2007]; *see also* 73 Fed Reg 28866, 28890 [May 19, 2008] [proposing disclosure of effect of fees or security deposit in "initial disclosure", or account opening, statements]) does not alter our conclusion. After all, "[t]he proposal of regulations is not synonymous with [their] adoption" (*see State by Malone v Burlington N., Inc.*, 311 Minn 89, 92, 247 NW2d 54, 55 [Minn 1976]).

Moreover, the Board, the Office of Thrift Supervision, and the National Credit Union Administration, pursuant to their authority under the Federal Trade Commission Act, have also recently proposed Regulation AA, a provision of which would prohibit charging fees and security deposits that constitute a majority of a consumer's credit limit during the first 12 months of the account and would also require credit issuers to spread the cost of fees totaling more than 25 percent of a consumer's credit limit equally over the course of the year (*see* 73 Fed Reg 28904, 28923-28925 [May 19, 2008]). The agencies' rationale for adopting proposed Regulation AA is that the practice of charging fees that quickly deplete a new customer's credit limit "appears to be an unfair act or practice" under the Federal Trade Commission Act, the very statute General Business Law §§ 349 and 350 were modeled upon (*id.* at 28,924). And to support their conclusion that consumers "may lack the information necessary to avoid harm" from this practice, the agencies cite to the Appellate Division's initial decision in the instant case (*see id.* at 28924 & n 60 [quoting Appellate Division's conclusion (*see* 27 AD3d at 108) that CCB's post-2001 solicitations " 'did not represent an accurate estimation of a consumer's credit limit' "]). Thus, from these recent regulatory proposals, we

Therefore, we hold that petitioner's Executive Law and Consumer Protection Act claims are not preempted by TILA or Regulation Z.

III.

We turn next to the res judicata effect of the *Allec* settlement upon a portion of the Attorney General's claims for restitution. Pursuant to California's procedural rules (Cal. Rules of Court 3.769 [f]), New York consumers were provided with notice of the settlement and the opportunity to "opt-in" to a nationwide settlement class. In exchange for certain payments or account credits, consumers who opted-in:

> "forever released and discharged [respondents] from any claims . . . of any nature . . . that [they] have had in the past or now have against respondents, which relate to the solicitation or origination of the cardholder relationship, the 'pre-approval' or persons being solicited for CCB credit cards, the Initial Credit Card Fees, the assignment of credit limits and/or Disclosure Claims; and all claims set forth in the [*Allec*] action"

The California court approved the settlement. And the parties do not dispute that the *Allec* action was dismissed with prejudice, thereby "forever barr[ing]" all settlement class members

---

can infer that TILA and Regulation Z have not previously embraced the regulation of credit limit practices that were determined to be deceptive below.

from prosecuting the released claims against respondents. Under California law, such a finally-approved settlement is entitled to res judicata effect (*see e.g., Johnson v Am. Airlines, Inc.*, 157 Cal App 3d 427, 431, 203 Cal Rptr 638, 640 [1984]; *see also* Moore & Thomas, Cal Civ Prac Proc § 32:17 [2008 ed] ["A judgment rendered in a proper class action is res judicata as to the claims of every member of the class although they are not formal parties to the suit"]).[15]

In New York, res judicata, or claim preclusion, bars successive litigation based upon the "same transaction or series of connected transactions" (*see* Siegel, NY Prac § 447 [4th ed]) if: (i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was (*see Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]; Weinstein-Korn-Miller, NY Civ Prac ¶ 5011.08 [2d ed]). Here, the parties' dispute focuses solely upon the second prong of the res judicata test, privity.

The Attorney General argues that he is not in privity with members of the *Allec* settlement class because his interest in seeking restitution

---

[15] The California court's September 30 Order states that "[a]s of Final Approval, the Action is . . . dismissed with prejudice." No order granting final approval (*see* Cal. Rules of Court 3.769 [h] [providing for entry of judgment "after the final approval hearing"]), however, appears in the record. Nevertheless, neither party disputes Supreme Court's statement that "there is no question that the *Allec* class action was dismissed with prejudice on the merits" pursuant to the *Allec* settlement.

on those consumers' behalf is far broader than their individual pecuniary concerns. Rather, he seeks restitution as a means of deterring future fraud, deception, and false advertising and restoring the public's trust in the consumer credit marketplace. Amici, the Attorneys General of 30 states, agree with that view and urge us to consider the problem of "class action abuse," which, they say, has led to collusive and undervalued settlements such as that entered in *Allec*. Respondents counter by invoking our traditional solicitude towards settlement agreements, urging us to permit the *Allec* settlement class members only one opportunity to obtain make-whole relief. We agree with respondents.

Our precedents have repeatedly explained that privity is not susceptible to a hard-and-fast definition (*see Watts v Swiss Bank Corp.*, 27 NY2d 270, 277 [1970] ["[T]he term privity does not have a technical and well-defined meaning"]; *Gramatan*, 46 NY2d at 485 ["[P]rivity is an amorphous term not susceptible to ease of application"]; *Buechel v Bain*, 97 NY2d 295, 304-305 [2001] ["[P]rivity is " 'an amorphous concept' "]). Although we have provided examples of cases in which privity is present (*see Green v Santa Fe Indus.*, 70 NY2d 244, 253 [1987]; *see also Buechel*, 97 NY2d at 305) none of those are applicable here. Ultimately, we must determine whether the severe consequences of preclusion flowing from a finding of privity strike a fair result under the circumstances (*see Buechel*, 97 NY2d at 304). This inquiry is, of course, informed by reference to the policies that res judicata is

designed to protect (*see Reilly v Reid*, 45 NY2d 24, 28 [1978]).

It is a " 'familiar doctrine' " that a class action judgment is binding upon class members who were adequately represented in the action (*see Richards v Jefferson County, Alabama*, 517 US 793, 800-801 [1996], *quoting Hansberry v Lee*, 311 US 32, 42-43 [1940]; *see also Taylor v Sturgell*, 552 US ___, 2008 US LEXIS 4885, *27 [June 12, 2008] ["Representative suits with preclusive effect on nonparties include properly conducted class actions"]; Restatement (Second) of Judgments § 41 [e] & cmt. e [in properly authorized class actions "persons within the class are bound by a judgment for or against the representative"]; 18 Moore's Federal Practice–Civil § 131.40 ["All class members will be bound, under [res judicata] . . . by a final judgment in a class action, including a judgment following settlement, assuming the action met the necessary procedural due process prerequisites"]). The adequacy of representation in the *Allec* action is not at issue here (*see* Restatement (Second) of Judgments § 42 [d]-[f]).

The Attorney General argues, however, that his interest in protecting the public was not represented at all in the *Allec* case. Indeed, he points out that he was not provided with notice of the settlement or an opportunity to object to it. Nevertheless, one specific portion of the relief petitioner seeks here—restitution for pre-January 1, 2002 claims—is identical to that which the New York members of the *Allec* settlement class have already pursued to a final and binding

judgment. As to that measure of relief alone, we hold that there is privity.[16]

Our conclusion is supported by a core principle of res judicata, a party's right to rely upon the finality of the results of previous litigation (*see New York State Labor Relations Bd. v. Holland Laundry, Inc.*, 294 NY 480, 493 [1945] ["[T]he public tranquillity demands that, having been once . . . tried, all litigation of [a] question, and between [the] parties, should be closed forever"]; *Reilly*, 45 NY2d at 28 ["Res judicata is designed to provide finality in the resolution of disputes"]; *cf. Olympic Tower Assoc. v City of New York*, 81 NY2d 961, 962-963 [1993] [settlement agreement

[16] Our holding is in accord with the U.S. Supreme Court's recent rejection of "virtual representation" as a basis for claim preclusion under federal common law (*see Taylor*, 552 US ___, 2008 US LEXIS 4885, *43). With respect to petitioner's claim for restitution, the members of the *Allec* settlement class, on whose behalf the Attorney General sues, have already had their "day in court" (*see id.* at *24, 33-34). Moreover, there is no dispute that the settlement class members' interests were adequately represented in the California court, where they were afforded "the procedural safeguards" codified in California's procedural rules governing class actions (*see id.* at *37-38). Furthermore, our holding today does not authorize " 'de facto class actions,' " rather we give effect to the results obtained in an actually-litigated class action (*see id.* at *38, *quoting Tice v Am. Airlines, Inc.*, 162 F3d 966, 973 [7th Cir 1998]). Finally, our conclusion does not result in the proliferation of an amorphous balancing test, requiring the evaluation of myriad case-specific factors (*see id.* at *39). Instead, we look simply to the judgment approving a class action settlement and the nature of the claims released therein to determine the extent to which petitioner's claim for restitution is precluded.

entitled to res judicata effect]; Siegel, NY Prac § 444 [4th ed] [judgments entered pursuant to settlement are entitled to res judicata effect]). A similar respect for finality has informed our long-standing rule that—absent exceptional circumstances such as duress, illegality, fraud, or mutual mistake (*see Mangini v McClurg*, 24 NY2d 556, 563 [1969])—a settlement must be enforced according to its terms (*see Denburg v Parker Chapin Flattau & Klimpl*, 82 NY2d 375, 383 [1993]).

Permitting the Attorney General to seek additional restitution on behalf of the *Allec* settlement class members would undoubtedly "destroy or impair rights" conclusively established in the *Allec* case (*see Schuylkill Fuel Corp. v Nieberg Realty Corp.*, 250 NY 304, 306-307 [1929] [Cardozo, J.]). Indeed, the Attorney General has asserted that restitution is about making consumers whole. The problem here is that the *Allec* settlement class members have already compromised their entitlement to a full-measure of make-whole relief in a proper judicial forum (*cf. Equal Opportunity Employment Comm'n v Waffle House*, 534 US 279, 297 [2002] ["[I]t 'goes without saying that the courts can and should preclude double recovery by an individual' "]). Although we recognize the importance of permitting petitioner to seek restitution to deter Executive Law and Consumer Protection Act violations, we cannot allow him to do so at the expense of undermining a validly-entered judgment of a sister-state, which it is our constitutional duty to protect (U.S. Const., art. IV, cl. 1, 28 USC § 1738; *O'Connell v Corcoran*, 1 NY3d 179, 184 [2003]; *cf. Matsushita Elec Indus Co. v*

Epstein, 516 US 367, 374 [1996] ["[A] judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit"]).

Our holding does not, however, substantially prejudice the public interest served by the Attorney General in pursuing this action. Indeed, respect for the finality of the *Allec* settlement still permits the Attorney General to seek restitution on behalf of those not bound by the settlement and for the time-periods not embraced therein. In addition, the claims for injunctive relief, civil penalties, and costs remain undisturbed. And, as Supreme Court noted, the Attorney General might be able to obtain disgorgement —an equitable remedy distinct from restitution— of profits that respondents derived from all New York consumers, whether within the *Allec* settlement class or not (*see* 41 AD3d at 8 n 2; *cf. SEC v Fischbach Corp.*, 133 F3d 170, 175 [2d Cir 1997] ["As an exercise of its equity powers, the court may order wrongdoers to disgorge their fraudulently obtained profits"]; *accord Official Comm. of Unsecured Creditors of WorldCom, Inc. v SEC*, 467 F3d 73, 81 [2d Cir 2006]).[17]

We have considered petitioner's arguments regarding the Appellate Division's reversal of those portions of Supreme Court's January 27 Order awarding restitution for damages allegedly

---

[17] Although the Attorney General sought disgorgement as an alternative measure of relief in this case, Supreme Court did not grant that relief and—in the present posture— it would be inappropriate for us to do so.

incurred through consumers' participation in the CAP and re-aging programs and we find those arguments meritless. In addition, respondents' argument that extrinsic evidence of consumer deception is required to establish petitioner's Consumer Protection Act claims is unpreserved for our review.

Accordingly, the order of the Appellate Division should be affirmed without costs.

READ, J. (DISSENTING):

The federal Truth-in-Lending Act (TILA) preempts the Attorney General's bid to impose disclosure requirements on Cross Country Bank (CCB)'s credit card solicitations in the guise of this proceeding seeking injunctive relief, restitution and penalties pursuant to Executive Law § 63(12) (fraud), General Business Law § 349 (deceptive business practices), and General Business Law § 350 (false advertising). The majority reaches the opposite conclusion by dint of misreading TILA's special preemption rule for credit or charge card applications or solicitations. I respectfully dissent.

I.

Section 1610(e) of TILA states as follows:

> "Certain credit and charge card application and solicitation disclosure provisions

> "The provisions of subsection (c) of section 1632 [governing the form or manner of disclosure] and subsections (c), (d), (e), and (f) of section 1637 [governing the content or substance of disclosure] shall supersede any provision of the law of any State relating to the disclosure of information in any credit or charge card application or solicitation which is subject to the requirements of section 1637(c) or any renewal notice which is subject to the requirements of section 1637(d), except that any State may employ or establish State laws for the purpose of enforcing the requirements of such sections."

The majority reads the clause "which is subject to the requirements of section 1637(c)" to modify "information." Accordingly, the majority reasons, "[t]he scope of section 1610(e) preemption is . . . *expressly limited* to state laws relating to the disclosures *specifically required* under section 1637(c)" (majority op at 17) (emphases added). The majority therefore concludes that "there is no preemption here because neither CCB's claims nor the relief it was granted below have any effect upon these disclosures" (majority op at 15). That is, because there is no conflict between TILA's disclosure requirements and New York's consumer protection laws, CCB may (and indeed must) devise a solicitation complying with both federal and state law.

But the majority's reading of the statutory text is not correct. It completely

> "disregards—indeed, is precisely contrary to—the grammatical 'rule of the last ante-

> cedent,' according to which a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows . . . While this rule is not an absolute and can assuredly be overcome by other indicia of meaning, . . . construing a statute in accord with the rule is quite sensible as a matter of grammar" (*Barnhart v Thomas*, 540 US 20, 26 [2003] [quotation marks omitted]; *see also* 2A Singer and Singer, *Statutes and Statutory Construction* § 47:33, at 487 [7th ed 2007] ["Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent"]).

Here, the limiting clause "which is subject to the requirements of section 1637(c)" immediately follows and therefore modifies "any credit or charge card application or solicitation," *not* "information."

The Federal Reserve Board, which implements section 1610(e) through its Regulation Z (12 CFR Part 226), disagrees with the majority's textual analysis: the Board's expression of TILA's special preemption rule is completely at odds with the majority's apparent view that the clause "which is subject to the requirements of section 1637(c)" modifies "information" rather than "application or solicitation." In its discussion of section 1610(e), the Board took the position that "[s]tate laws relating to the disclosure of credit information in credit or charge card applications and solicitations subject to the requirements of [15 USC § 1637[c]) . . . are preempted" (54 Fed Reg

13855, 13855-13856 [Apr 6, 1989]). Accordingly, 12 CFR 226.28(d) states as follows:

> "(d) Special rule for credit and charge cards. State law requirements relating to the disclosure of credit information in *any credit or charge card application or solicitation that is subject to the requirements of [15 USC § 1637[c])* (§ 226.5a of the regulation) . . . are preempted. State laws relating to the enforcement of [15 USC § 1637[c]) . . . are not preempted" (emphasis added).

Concomitantly, the Board has defined those credit or charge card applications or solicitations that *are* subject to the requirements of section 1637(c) (credit or charge accounts used primarily by consumers to purchase goods and services), and those that *are not* (applications or solicitations to open overdraft lines of credit tied to asset accounts accessible by use of a debit card; open-end lines of credit accessed solely by account numbers; home equity lines of credit that may be accessed by the use of a credit or charge card and are subject to the Home Equity Loan Consumer Protection Act of 1988 amendments to TILA; applications and solicitations to add a credit or charge card to an existing open-end plan) (54 Fed Reg at 13856).

According to the Board, then, TILA supplants State law "requirements" that "relat[e] to the disclosure of credit information" in certain credit or charge card applications or solicitations (i.e., those that the Board has determined to be subject to the requirements of 15 USC § 1637[c]) (*id.* at 13855); thus, preemption is not limited to

"state laws relating to the disclosures specifically required under section 1637(c)" (majority op at 17). The Board's view in this regard is entirely consonant with the statute's text, and with Congress' purpose in adopting a special preemption rule in the first place.

At the time TILA was enacted in 1968, "consumer credit [was] preponderantly small and local in both its nature and operation . . . [T]here [was] no national market for consumer credit . . . outside [a consumer's] town or city, although there [was] some mail order business . . . But generally, the market for consumer credit [was] fairly restricted" (Miller and Rohner, *In Search of a Uniform Policy—State and Federal Sources of Consumer Financial Services Law*, 37 Bus Law 1415, 1415-1416 [1981-1982] [footnotes and quotation marks omitted]). In deference to these state interests, TILA preserved state jurisdiction to regulate disclosures in consumer credit transactions, including so-called "traditional" credit or charge card accounts used primarily by consumers to purchase goods and services.

Specifically, section 1610(a)(1) of TILA stated that its provisions did not "annul, alter, or affect the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this subchapter and then only to the extent of the inconsistency." "Since the statute and the legislative history provided [the Board] with little guidance on how to implement the preemption scheme, the [Board] had substantial leeway in deciding how and when state laws would be preempted" (Tid-

well, *Preemption of State Disclosures by the Truth in Lending Act: The Continuing Quest for a Workable Formula*, 40 Bus Law 933, 935-936 [1984-1985] [discussing in detail the Board's interpretation and implementation of TILA preemption from 1969 until the mid-1980s]).

In section 226.6(b) of the original Regulation Z, the Board counseled that a state law was "inconsistent" with TILA or Regulation Z

> "to the extent that it required disclosures or actions 'different' from the requirements of the regulation with respect to form, content, terminology, or time of delivery; disclosure of the amount of the finance charge determined in any manner other than that prescribed by the regulation; and disclosure of the APR determined in any manner other than that prescribed in the regulation" (Tidwell at 936).

In addition, section 226.6(a) of the original Regulation Z "provided that no other information could be placed with the federal disclosures if it would tend to detract from [them] or mislead or confuse the consumer" (Tidwell at 936).

It was generally left up to creditors to decide whether a state law was inconsistent, although the Board issued a number of interpretive letters. A creditor was, in fact, permitted to make an inconsistent state law disclosure so long as it was placed on a separate piece of paper from the TILA disclosures, or below a clearly marked line on the same statement containing the TILA disclosures (12 CFR former 226.6[c]; Tidwell at 936-937). The Board cautioned creditors "that when

making a determination of what information would not mislead, confuse, or detract from the required disclosures, they should be ready to justify their determinations before their enforcement agency and the courts" (*id.* at 938).

"The gist of the policy toward preemption of state laws during the 1970s" has been summarized as follows:

> "State-required disclosures were rarely, if ever, fully preempted in the sense that the creditor was forbidden to use them in contract documents. Instead, *creditors remained subject to any state disclosure law that called for more detailed or different information*, and creditors were always free to make state-required disclosures, either below a demarcation line or as permissible 'additional information' interspersed among the TIL disclosures . . . If a creditor decided to make his own preemption determinations, he ran the risk that a state court might deem the disclosure necessary for contract validity. Therefore, not assuming the risk was considered prudent" (*id.* at 941) (emphasis added).

Not surprisingly, lengthy, complex and confusing credit forms proliferated.

Nonetheless, when Congress passed the Truth in Lending Simplification and Reform Act (Pub L 96-221) in 1980, it only tweaked TILA's preemption provision: the inconsistency standard remained in section 1610(a)(1), although the Board was now mandated to determine if a state law requirement was inconsistent upon the

request of a creditor, state or interested party. Moreover, a state law disclosure requirement could no longer appear in consumer credit contract documents once the Board decided it was inconsistent.[1]

When it revised Regulation Z in 1981 to bring it in line with the TIL Simplification and Reform Act, the Board framed the preemption standard very narrowly so as to displace little state law. That is, a state law was now inconsistent only if it

> "require[d] a creditor to make disclosures or take actions that *contradict[ed]* the requirements of the federal law. A state law [was] contradictory if it require[d] the use of the same term to represent a different amount or a different meaning than the federal law, or if it require[d] the use of a term different from that required in the federal law to describe the same item" (12 CFR former 226.28[a][1]; *see* 46 Fed Reg 20848, 20906 [Apr 7, 1981]) (emphasis added).

In short, "[t]he 'contradictory' standard" in Regulation Z

> "simply remove[d] many state disclosure provisions . . . from the scope of preemption and concomitantly allow[ed] compliance with

---

[1] Interestingly, the TIL Simplification and Reform Act also amended TILA preemption so as generally to permit a creditor, state or interested party to petition the Board to determine whether a state-required disclosure was so similar to the disclosure mandated by TILA that creditors in that state could comply with the state law in lieu of making TILA disclosure (*see* 15 USC § 1610[a][2]).

> state law in borderline situations. Allowing creditors to comply with state disclosure requirements until the [Board] ma[de] a preemption determination remove[d] any fear of creditor violation of the TILA by making these required [state] disclosures" (Tidwell at 944).

Congress next revisited TILA in a major way in 1988, when it enacted the Fair Credit and Charge Card Disclosure Act (FCCCDA) (Pub L 100-583). By 1988, the credit card business was a large, nationwide industry, not "preponderantly small and local in both its nature and operation," as had been the case in 1968 when TILA was enacted. In addition, beginning in 1986 with Wisconsin's enactment of a disclosure statute, state legislation in this area was burgeoning: by the time the FCCCDA was adopted, "at least 11 states and Suffolk County in New York had enacted new cost of credit legislation designed to foster price competition among card issuers" (Gelb and Cubita, *The Fair Credit and Charge Card Disclosure Act of 1988: A Federal Alternative to the Rate Ceiling Approach*, 44 Bus Law 941, 941 n 1 [1988-1989]). So this time, Congress tackled preemption head on, devising a "special" rule for disclosure of credit information in credit or charge card applications or solicitations, which "depart[ed] radically from" the inconsistency standard, "the approach which Congress historically [had] adopted in the credit disclosure area" (Gelb and Cubita at 955).

The FCCCDA dictated what credit information had to be disclosed (15 USC § 1637[c], [e] and [f]),

and the manner of its disclosure (15 USC 1632[c]) in credit or charge card applications or solicitations. To ensure that the marketplace did not outpace its detailed mandates, Congress in section 1637(c)(5) provided as follows:

> "Regulatory authority of the Board
>
> "The Board may, by regulation, require the disclosure of information *in addition to* that otherwise required by this subsection . . ., and *modify any disclosure of information required by* this subsection . . ., in any application to open a credit card account for any person under an open end consumer credit plan or any application to open a charge card account for any person, or a solicitation to open any such account without requiring an application, if the Board determines that such action is necessary to carry out the purpose of, or prevent evasions of, any paragraph of this subsection" (emphasis added).

Section 1610(e), as previously discussed, then specified that the provisions of sections 1632(c) (governing the form or manner of disclosure) and 1637(c),(e) and (f) (governing the content or substance of disclosure) "supersede[d] any provision of the law of any State relating to the disclosure of information in any credit or charge card application or solicitation which is subject to the requirements of section 1637(c)" except to enforce TILA and Regulation Z.

Congress thus occupied the entire field of cost-of-credit disclosures in credit or charge card applications or solicitations: it set out compre-

hensive requirements and established a singular *federal* mechanism (the Board) to add to or modify these requirements to keep abreast of developments in the consumer credit or charge card business. A state may enforce TILA's disclosure provisions, and surely a state may bring consumer complaints to the Board's attention and advocate revisions to Regulation Z. The language of section 1610(e) and the structure of TILA's regulatory scheme after Congress' adoption of the FCCCDA, however, belie any notion that a state may use its consumer protection laws to impose additional or different cost-of-credit disclosure on a creditor. The majority's contrary statutory interpretation produces a patchwork scheme whereby each state may effect different or additional credit disclosure requirements unless and until the Board acts pursuant to section 1637(c)(5) to regulate the form or substance of disclosure of the same item of credit information, which would perforce then become "information . . . which is subject to section 1637(c)."[2] This, of

---

[2] At least I assume that the majority would, at a minimum, acknowledge that if the Board, for example, ultimately amends Regulation Z to require disclosure of the effect of fees or a security deposit upon an applicant's credit limits in credit card applications (*see* majority op at 21, n 14), the State could no longer challenge the form or substance of the disclosure of credit limits via a lawsuit grounded in State consumer protection laws. That is, when my colleagues state that "[t]he scope of section 1610(e) preemption is . . . expressly limited to state laws relating to the disclosures specifically required under section 1637(c)" (majority op at 17), I assume they must intend "disclosures specifically required under section 1637(c)" to include any additional or modified disclosures required in Regulation Z

course, completely undermines the uniformity of the federal regime that Congress devised to govern a nationwide industry. Moreover, it leaves no room for the possibility that the Board may have policy reasons *not* to mandate a particular disclosure that a state considers to be warranted (*see Arkansas Elec. Coop. Corp. v Arkansas Pub. Serv. Commn.*, 461 US 375, 384 [1983] [Under the Supremacy Clause, "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much preemptive force as a decision *to* regulate"]).

As the discussion of the evolution of TILA preemption illustrates, before Congress adopted the special preemption rule, states supplemented federal credit disclosure requirements with regularity. If Congress had wanted this state of affairs to continue, there would have been no need for it to supplant the inconsistency/contradictory standard in section 1610(a)(1) (as interpreted by the Board in Regulation Z) with the special preemption rule in section 1610(e). By reading the special preemption rule as it does, the majority has undone Congress' handiwork: the majority has effectively reinstated the inconsistency/contradictory standard for disclosures in credit or charge card applications or solicitations. While the majority cloaks its interpretation of section 1610(e) in the garb of the presumption

---

by the Board pursuant to its section 1637(c)(5) authority. If not, the injury to the federal regime would be even more severe.

against preemption of state law (majority op at 16-17), the presumption does not empower a state court to circumvent Congress' will as expressed in non-ambiguous statutory language ("In all pre-emption cases . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act *unless that was the clear and manifest purpose of Congress*," *Medtronic v Lohr*, 518 US 470, 485 [1996] [emphasis supplied, internal quotation marks and citations omitted]).

II.

In this litigation, the Attorney General has taken the position—approved by the majority—that

> "*the overall impression* of CCB's representations regarding its credit cards, taken as a whole, was fraudulent and misleading to the average consumer. The flaw in these representations was not that they failed to provide the disclosures required by TILA, but rather that they affirmatively misled consumers and thus violated New York's consumer protection laws. *Because the petition alleges affirmative deception rather than inadequate disclosure, the claim is not preempted by TILA*" (emphases added).

In sum, the Attorney General argued that whether or not CCB's solicitations comported with TILA or Regulation Z was basically irrelevant because he was only suing to enforce state

laws prohibiting unfair or deceptive acts or practices, and TILA does not preempt these state laws. He stressed that he did not seek or obtain "an order requiring that anything actually be disclosed, but rather requested and received an order enjoining [CCB] from misrepresenting credit terms."

The foundation for the Attorney General's analytical edifice is the Board's discussion of the scope of section 1610(e) when it revised Regulation Z to implement the FCCCDA. In fact, the Attorney General argues that the Board "directly answer[ed] the question posed in this case by declaring that 'prohibitions against unfair and deceptive acts or practices (such as 'mini-FTC acts') also are not preempted,'" quoting the Board's commentary accompanying the final version of section 228.28(d) of Regulation Z (54 Fed Reg at 13864; *see also* majority op at 20-21).

First, the statement that the Attorney General seizes upon is both truncated and taken out of context. The paragraph in which it appears reads in its entirety as follows:

> "In addition, state laws regulating the substance of transactions subject to section 127(c) (15 USC § 1637[c] [applications and solicitations]) or (d) (15 USC § 1637[d] [renewal notice]) are not preempted, nor are state laws preempted that regulate the form or content of the disclosure of information that is unrelated to the scope and content of information required to be disclosed section 127(c) or (d). Thus, for example, the following types of state laws are not preempted: laws

> requiring card issuers to offer a grace period[3] or prohibiting certain fees in credit or charge card transactions; laws such as retail installment sales acts and plain language laws[4], unless they regulate the disclosure of credit term information in credit and charge card applications, solicitations or renewal notices; laws requiring notice of a consumer's rights under the antidiscrimination or similar laws; and laws notifying consumers about credit information available form state authorities. *Finally, state laws regarding the enforcement of the requirements of section 127(c) or (d) or of any prohibitions against unfair and deceptive acts or practices (such as state 'mini-FTC acts') also are not preempted*" (54 Fed Reg at 13863-13864) (emphasis added).

This last sentence accords with the House Conference Report for the FCCCDA, which also discussed the use of mini-FTC statutes *solely* in the context of enforcing TILA and Regulation Z (*see* HR Conf Rep No. 100-1069, 100th Cong, 2d Sess, at 21-22, reprinted in 1988 USCCAN at 3960;[5]

---

[3] *See e.g.* Personal Property Law § 413(3)(c)(ii).

[4] *See e.g.* General Obligations Law § 5-702.

[5] Here, the Attorney General concededly did not bring this lawsuit to enforce TILA or Regulation Z; therefore, the comment in the House Conference Report to the effect that disclosures beyond those specified in section 1637(c) might be required or obtained in the settlement or adjudication of such a lawsuit is beside the point here (*see* majority op at 20).

see also 12 CFR part 226, supp I at 577 [2008 ed]; Gelb and Cubita, *Implementation of the Fair Credit and Charge Card Disclosure Act of 1988: The Regulatory Response*, 44 Bus Law 1427, 1437 [1988-1989] ["[T]he supplementary information accompanying the final regulation indicates that [section 1610(e)] would not preempt state laws concerning the substance of credit card arrangements[6] or the form and content of disclosures that are unrelated to the scope and content of the federal application, solicitation, and renewal disclosures" and, "[b]y way of illustration," offers examples]).

What is notably missing from the Board's discussion is any suggestion whatsoever that state mini-FTC laws might—after enactment of the FCCCDA with its special preemption rule—remain available as a mechanism to impose disclosure requirements on creditors over and above those mandated by TILA and Regulation Z. Indeed, the Board emphasized that

> "[s]tate laws relating to *the terms of credit* required to be disclosed or *the manner* in which such terms must be disclosed are preempted as to any credit or

[6] For example, section 1610(e) would not have prevented the Attorney General from challenging CCB's *practice* of charging fees and security deposits that constitute a majority of a consumer's credit limit for the first 12 months of the account (*see* majority op at 21 n 14 [discussing proposed Regulation AA, which would regulate this practice under the Federal Trade Commission Act because it "appears to be an unfair act or practice" (73 Fed Reg 28904, 28923 [May 19, 2008])]).

> charge card application or solicitation that is subject to [15 USC § 1637[c]) . . . The preemption of such provisions of state law is *total*, and differs from other provisions of the TILA which generally preempt only inconsistent state laws" (54 Fed Reg at 13863) (emphases added).

This position is in tune with the text of section 1610(e) and the history of the special preemption rule; it is reflected in the broad wording chosen by the Board to implement section 1610(e)—i.e., "[s]tate law requirements relating to the disclosure of credit information."

Finally, the Attorney General (and the majority) cannot evade preemption by portraying this enforcement action as a suit to enjoin a misleading and fraudulent "overall impression" rather than "inadequate disclosure." The only way for CCB to dispel the complained-about "overall impression"—the only way for CCB to comply with Supreme Court's injunction[7]—is to revise and alter the form and content of its solicitations; i.e., to make different and/or additional disclosures (*compare* majority op at 16 ["We again emphasize . . . that (the Attorney General's) success in this case does not force (CCB) . . . to affirmatively disclose any additional credit terms"]). Neither the Attorney General nor the majority explains how else CCB may elimi-

[7] In relevant part, the injunction enjoins CCB "from engaging in the fraudulent, deceptive and unlawful acts and practices alleged in the Verified Petition" by "misrepresenting" certain credit information.

nate the alleged misrepresentations from its solicitations.

III.

Just a few months ago, the United States Supreme Court handed down *Riegel v Medtronic, Inc.* (___US ___, 128 S Ct 999 [2008]). Riegel sued Medtronic for damages, alleging that a catheter marketed by the company was "designed, labeled and manufactured in a manner that violated New York common law, and that these defects caused [him] to suffer severe and permanent injuries" (128 S Ct at 1005). The type of catheter implicated in Riegel's injuries had received premarket approval from the Food and Drug Administration(FDA) under a federal safety oversight regime created by the Medical Device Amendments of 1976 (MDA). The MDA includes a preemption provision; specifically, 21 USC § 360k(a) provides that a state shall not

> "establish or continue in effect with respect to a device . . . any requirement—(1) which is different from, or in addition to, any requirement applicable under [federal law] to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under [relevant federal law]."

The issue in *Riegel* was whether the FDA's approval of the catheter precluded the New York common law tort suit. The Supreme Court (affirming the United States Court of Appeals for

the Second Circuit) decided that the MDA preempted Riegel's civil suit, reasoning that "[a]bsent other indication, [Congress'] reference to a State's 'requirements' includes its common-law duties," and these "requirements" were "different from, or in addition to" the federal ones (128 S Ct at 1008). Further, the Court remarked that section 360k did "not prevent a State from providing a damages remedy for claims premised on a violation of FDA regulations" because in such a case the state duties would " 'parallel' rather than add to, federal requirements" (*id.* at 1011).

This is an even clearer case for preemption than *Riegel*. In *Riegel*, the preemption provision did not explicitly mention civil tort liability. Here, there can be no doubt that the Attorney General's claims under the Executive Law and the General Business Law are made under a "provision of the law of [the] State relating to the disclosure of information" in solicitations governed by TILA (15 USC § 1610[e]); or, as articulated by the Board, are "[s]tate law requirements relating to the disclosure of credit information" (12 CFR 226.28[d]). As the Supreme Court has observed, "[t]he ordinary meaning of [the phrase 'relating to'] is a broad one—to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with—and the words thus express a broad pre-emptive purpose" (*Morales v TWA*, 504 US 374, 383 [1992] [quotation marks and citation omitted]). The majority avoids this evident conclusion only by resorting to its faulty analysis that the "scope of section 1610(e) preemption is . . .

expressly limited to state laws relating to disclosures specifically required under 1637(c)" (majority op at 17).

The majority also concludes that the MDA's preemption provision is broader than section 1610(e) because the former displaces those state requirements that are "different from, or in addition to" federal law. Yet again, the majority relies on its erroneous reading of section 1610(e) to "expressly limit[ ]" preemption "to state laws relating to the disclosures specifically required under section 1637(c)" (majority op at 17). In fact (and as discussed previously), the wording of section 1610(e) illustrates its preemption of the entire field of disclosure of cost-of-credit information in credit or charge card solicitations. Indeed (as discussed previously), under the formerly applicable inconsistency/contradictory standard, states were empowered to enforce state law disclosure requirements that differed from or added to the requirements established for credit or charge card solicitations by Congress in TILA. Congress fashioned the "special" preemption rule in section 1610(e) precisely because it wanted to cut off and fully supplant supplemental state regulation in this area: only the Board may add to or modify TILA's statutory disclosure requirements.

Finally (again as discussed previously), the relief that the Attorney General sought (and has obtained) inevitably calls for CCB to alter the format and content of the disclosures in its credit or charge card solicitations of consumers *in New York*, thus "disrupt[ing] the federal scheme" envisaged and designed by Congress to "enhance credit shopping" by requiring "more detailed and

uniform" disclosure of credit information to consumers nationwide (*see Riegel*, 128 S Ct at 1008; 54 Fed Reg at 13855; *compare* majority op at 17).

IV.

The majority's desire to maximize our State's regulatory reach in the area of consumer protection is unsurprising. And the Board has arguably been slow to appreciate the value to consumers of at least certain of the specific disclosures at issue in this case (*see* 72 Fed Reg 32948 [June 14, 2007] [proposal by the Board to amend Regulation Z following a comprehensive review of TILA's rules for open-end (revolving) credit that is not home-secured]). But State pride and good intentions are not enough to justify this lawsuit. To borrow words from the Second Circuit's decision in a recent preemption case, "[i]f New York's view regarding the scope of its regulatory authority carried the day, another state could be free to enact," its own laws or bring its own lawsuits to supplement or modify the credit disclosures required by TILA and Regulation Z, thus "unraveling the centralized federal framework" in this area (*Air Transp. Assn. of Am. v Cuomo*, 520 F3d 218, 225 [2d Cir 2008] [determining that federal law preempts New York State's Passenger Bill of Rights (General Business Law 251-g[1])]). In enacting section 1610(e), Congress essentially decided that the benefits from a uniform, nationwide regime for disclosure under the aegis of the Board outweighed any loss of protection to consumers under state law. The Supremacy Clause permits Congress to make this

judgment, and we are bound to honor it. Accordingly, I respectfully dissent.

* * * * * * * * * * * * * * * * * *

Order affirmed, without costs. Opinion by Judge Ciparick. Chief Judge Kaye and Judges Graffeo, Pigott and Jones concur. Judge Read dissents in an opinion. Judge Smith took no part.

Decided June 26, 2008

No. 97985

SUPREME COURT, APPELLATE DIVISION
THIRD DEPARTMENT, NEW YORK

December 1, 2005

IN THE MATTER OF THE PEOPLE OF THE STATE OF NEW YORK, BY ELIOT SPITZER, AS ATTORNEY GENERAL,

Respondent,

—v.—

APPLIED CARD SYSTEMS, INC., et al.,

Appellants.

Appeal from an order and judgment of the Supreme Court (Cannizzaro, J.), entered June 24, 2004 in Albany County. The order and judgment, among other things, granted petitioner's application, in a proceeding pursuant to Executive Law § 63(12), to enjoin respondents from engaging in certain fraudulent acts.

APPEARANCES OF COUNSEL

Cooper, Erving & Savage, L.L.P., Albany *(Martin C. Bryce Jr. of Ballard, Spahr, Andrews & Ingersoll, L.L.P.*, Philadelphia, Pennsylvania, admitted pro hac vice, of counsel), for appellants.

Eliot Spitzer, Attorney General, Albany *(Mark D. Fleischer* of counsel), for respondent.

OPINION OF THE COURT

PETERS, J.

Respondent Cross Country Bank, Inc. (hereinafter CCB) provides credit cards to consumers who are otherwise unable to qualify for credit. Respondent Applied Card Systems, Inc. (hereinafter ACS) services CCB's accounts and engages in collection activities. Petitioner contends that CCB was representing, in direct mail solicitations, that prospective consumers would be approved for a credit limit up to $2,500 when, in reality, credit limits were often less than $400. Each account was assessed a $100 application fee and a $50 annual membership fee immediately upon the opening of the account, often leaving the consumer with far less credit than they had originally anticipated. This led to a downward spiral of accruing interest, late fees and over-limit penalties. Moreover, unbeknownst to consumers, CCB allegedly enrolled them in third-party membership benefit programs for which a fee was immediately assessed upon the account. One such program, the Credit Account Protection (hereinafter CAP) program, was vir-

tually useless to New York consumers. Petitioner further alleged that ACS employees would harass consumers by telephone wherein they would, among other things, misrepresent their identities to facilitate contact with the consumer, call them at work after having been instructed not to do so, use obscene and abusive language, and make unauthorized debits from their checking accounts.

In April 2003, petitioner commenced this special proceeding pursuant to CPLR 409(b) to permanently enjoin respondents from engaging in these activities. It alleged violations of Executive Law § 63(12), General Business Law §§ 349 and 350, and General Business Law article 29-H. Respondents denied the allegations and raised numerous affirmative defenses. Upon Supreme Court's issuance of a permanent injunction preventing respondents from engaging in the challenged activities, this appeal ensued.

Special proceedings brought pursuant to CPLR 409(b) are subject to the same standards that apply to a motion for summary judgment (*see* CPLR 409[b]; *Matter of Port of N.Y. Auth. [62 Cortlandt Realty Co.]*, 18 N.Y.2d 250, 255 [1966], *cert. denied sub nom. McInnes v. Port of N.Y. Auth.*, 385 U.S. 1006 [1967]; *Matter of People v Telehublink Corp.*, 301 A.D.2d 1006, 1007 [2003]). Under Executive Law § 63, the Attorney General may utilize CPLR 409(b) to seek injunctive relief against any business engaged in repeated fraudulent or illegal conduct in the

transaction of business.[1] The test is whether the act complained of "has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud. Executive Law § 63(12) was meant to protect not only the average consumer, but also 'the ignorant, the unthinking and the credulous' " (*People v General Elec. Co.*, 302 A.D.2d 314, 314 [2003] [citations omitted], quoting *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 273 [1977]) As to the claims alleging deceptive business practices or false advertising under General Business Law §§ 349 and 350, the Attorney General was required to establish that respondents engaged " 'in an act or practice that is deceptive or misleading in a material way and that [the consumer] has been injured by reason thereof' " (*Small v Lorillard Tobacco Co.*, 94 N.Y.2d 43, 55 [1999], quoting *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 N.Y.2d 20, 25 [1995]; *accord Solomon v Bell Atl. Corp.*, 9 A.D.3d 49, 54 [2004]). While the proof must show that the representations or omissions are "likely to mislead a reasonable consumer acting reasonably under the circumstances" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, supra* at 26) for conduct to be actionable it need "not necessarily rise to the level of fraud" (*Gaidon v Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 343 [1999]); even omissions may be the basis for such claims (*see Bildstein v MasterCard Intl.*,

---

[1] Such conduct has been defined as "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions" (Executive Law § 63[12]).

2005 WL 1324972 *3 2005 US Dist LEXIS 10763, 10-11 [SDNY, June 6, 2005]).

(1) Reviewing these solicitation offers as a whole (*see Matter of Lefkowitz v E.F.G. Baby Prods. Co.*, 40 A.D.2d 364, 368 [1973]), and recognizing that the interpretations of the Federal Trade Commission Act (*see* 15 USC § 45 *et seq.*) are useful in determining the aforementioned violations under both the Executive Law and General Business Law (*see Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, supra* at 26; *Matter of State of New York v Colorado State Christian Coll. of Church of Inner Power*, 76 Misc.2d 50, 54-55 [1973]), we agree that the violations were established as a matter of law. The offers had a prominent display informing consumers that they had been "preapproved" for a credit limit up to $1,000 or $2,500. They did not state that most consumers who received these solicitations do not receive even half of the amount listed. While minimum credit limits were detailed in the solicitations, no disclosures revealed how likely a consumer was to receive amounts above the minimum. Scripts used by telemarketers to solicit consumers did not clarify this information or reveal credit limits usually granted. In response to the representation by CCB's vice president, Paul Seitz, that these problems had been corrected since June 2001, our review of the new disclosures found the correction to be embedded on the second page of the "Terms and Conditions of Offer," in the same typeface as the rest of the paragraph. Recognizing that respondents submitted the affidavit of Donald Whittaker, a private con-

sultant who reviewed the terms of the solicitation from December 2001, categorizing the disclosure as "unsurpassed in the industry," we find Supreme Court to have correctly determined that neither of these proffers addressed the obvious problems associated with the initial solicitations. As to the later solicitations, they still did not represent an accurate estimation of a consumer's credit limit; at all times, it appeared that the confusion was purposely fostered by respondents' telemarketers. As the allegations here "are based on deceptive business practices, not on deceptive contracts" (*Gaidon v Guardian Life Ins. Co. of Am., supra* at 345), we agree that regardless of what the industry standards are for these disclosures, a reasonable consumer would be misled in believing that the "up to" amount boldly displayed on the solicitation letter was representative of a likely amount that a consumer would receive (*see Federal Trade Commn. v Febre,* 1996 WL 396117, *2, 1996 US Dist LEXIS 9487, *7-11 [N.D.Ill., July 3, 1996], *affd.* 128 F.3d 530 [1997]).

We further agree with Supreme Court that the information about the applicability of the CAP program in New York was deceptive. First, consumers could inadvertently enroll in the CAP program because its acceptance line was directly above the similarly looking acceptance line for the credit card. Second, the explanation regarding the benefits of the program, provided in a separate insert, described unemployment, family leave, life, dismemberment and disability benefits when only the life, dismemberment and disability benefits were available to New York consumers; that limitation was also embedded in

the fine print of the benefit description. For these reasons, the solicitations were misleading as a matter of law (*see generally Federal Trade Commn. v Crescent Publ. Group,* 129 F.Supp.2d 311, 321 [2001]) because a reasonable consumer was led to believe that by signing up for the program, he or she would be protected in case of an income loss due to the conditions described.

Next addressing the practice of automatically enrolling consumers in the Applied Advantage Program for which they were charged an additional fee on their already-limited credit card, the practice was no more palatable simply because the consumers could discontinue it at any time.[2] The solicitation letters stated, in the middle of the letter, that "[b]y simply responding to our 'invitation' and also accepting membership in Applied Advantage, you will be granted a Visa Gold credit card." To opt out, consumers were required to check a box at the bottom of the letter to indicate that they did *not* want to be enrolled in the program; it was not clear that a credit card, albeit with limited credit, would still be issued if they declined such membership. Although the later solicitation letters did not mention the Applied Advantage Program in the text of the initial solicitation, and instead provided a box on the bottom of the letter to indicate whether consumers wished to process the application with the Applied Advantage membership, the solicitations, as a whole, led consumers to believe that they had to participate in the costly program to achieve the credit desired. To the

---

[2] In later solicitations, membership was not automatic.

extent that respondents voluntarily discontinued automatic membership in such program, such voluntary discontinuance of fraudulent or deceptive practices will not bar the issuance of an injunction to prevent future practices (*see Federal Trade Commn. v Crescent Publ. Group, supra* at 320; *People v. General Elec. Co.*, 302 A.D.2d 314, 316 [2003], *supra*).

(2) We next reject respondents' contention that the Federal Truth in Lending Act (*see* 15 USC § 1601 *et seq.*) preempted petitioner's claims because the allegations seek to establish that CCB's disclosures were inadequate—an area within the exclusive province of said Act. In our view, the allegations instead pertain to unfair or deceptive acts or practices which are illegal under state law. As such, they are not preempted (*see* 12 CFR part 226, Supp. I, ¶ 28[d][1]; 12 CFR 226.28[d]; *Therrien v Resource Fin. Group,* 704 F.Supp. 322, 329 [1989]).[3]

Finally, considering the allegation that ACS engaged in improper debt collection practices pursuant to General Business Law article 29-H, the record reflects that despite an initial training emphasizing the parameters of the Debt Collection Procedures Act, the practice changed once

---

[3] This contention was not waived by respondents' failure to raise it as an affirmative defense in the answer (*see generally* CPLR 3018[b]) since it was used as a defense in the summary judgment motion (*see Rogoff v San Juan Racing Assn.*, 77 A.D.2d 831, 832 [1980], *affd.* 54 N.Y.2d 883, [1981]). Nor do we find that prejudice enured to petitioner after we considered the affirmative defenses that were properly raised (*see Sheils v County of Fulton,* 14 A.D.3d 919, 921 [2005], *lv denied* 4 N.Y.3d 711 [2005]).

actual collection practices commenced. ACS employees were encouraged to use aggressive and illegal practices, and evidence demonstrated that the salary of both the collector and the supervisor were determined by their success. Affidavits further established that ACS collectors used rude and obscene language with consumers, repeatedly called them even when requested not to do so, misrepresented their identities to gain access, and made unauthorized debits to consumer accounts. Petitioner presented approximately 203 complaints from consumers describing these practices and proffered affidavits from former employees, some supervisory, to confirm these allegations. While respondents submitted affidavits of several current employees of ACS which either detailed their compliance practice or challenged other proof submitted by petitioner, Supreme Court properly concluded that these submissions were insufficient to create an issue of fact regarding the specific allegations made in the consumer complaints.

MERCURE, J.P., CREW III, CARPINELLO and KANE, JJ., concur.

ORDERED that the order and judgment is affirmed, without costs.

15 U.S.C. § 1610. Effect on other laws

(a) Inconsistent provisions; procedures applicable for determination

(1) Except as provided in subsection (e) of this section, this part and parts B and C of this subchapter do not annul, alter, or affect the laws of any State relating to the disclosure of information in connection with credit transactions, except to the extent that those laws are inconsistent with the provisions of this subchapter and then only to the extent of the inconsistency. Upon its own motion or upon the request of any creditor, State or other interested party which is submitted in accordance with procedures prescribed in regulations of the Board, the Board shall determine whether any such inconsistency exists. If the Board determines that a State-required disclosure is inconsistent, creditors located in that State may not make disclosures using the inconsistent term or form, and shall incur no liability under the law of that State for failure to use such term or form, notwithstanding that such determination is subsequently amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(2) Upon its own motion or upon the request of any creditor, State, or other interested party which is submitted in accordance with procedures prescribed in regulations of the Board, the Board shall determine whether any disclosure required under the law of any State is substantially the same in meaning as a disclosure required under this subchapter. If the Board determines that a State-required disclosure is

substantially the same in meaning as a disclosure required by this subchapter, then creditors located in that State may make such disclosure in compliance with such State law in lieu of the disclosure required by this subchapter, except that the annual percentage rate and finance charge shall be disclosed as required by section 1632 of this title, and such State-required disclosure may not be made in lieu of the disclosures applicable to certain mortgages under section 1639 of this title.

(b) State credit charge statutes

Except as provided in section 1639 of this title, this subchapter does not otherwise annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State, including, but not limited to, laws relating to the types, amounts or rates of charges, or any element or elements of charges, permissible under such laws in connection with the extension or use of credit, nor does this subchapter extend the applicability of those laws to any class of persons or transactions to which they would not otherwise apply. The provisions of section 1639 of this title do not annul, alter, or affect the applicability of the laws of any State or exempt any person subject to the provisions of section 1639 of this title from complying with the laws of any State, with respect to the requirements for mortgages referred to in section 1602(aa) of this title, except to the extent that those State laws are inconsistent with any provisions of section 1639 of this title, and then only to the extent of the inconsistency.

(c) Disclosure as evidence

In any action or proceeding in any court involving a consumer credit sale, the disclosure of the annual percentage rate as required under this subchapter in connection with that sale may not be received as evidence that the sale was a loan or any type of transaction other than a credit sale.

(d) Contract or other obligations under State or Federal law

Except as specified in sections 1635, 1640, and 1666e of this title, this subchapter and the regulations issued thereunder do not affect the validity or enforceability of any contract or obligation under State or Federal law.

(e) Certain credit and charge card application and solicitation disclosure provisions

The provisions of subsection (c) of section 1632 of this title and subsections (c), (d), (e), and (f) of section 1637 of this title shall supersede any provision of the law of any State relating to the disclosure of information in any credit or charge card application or solicitation which is subject to the requirements of section 1637(c) of this title or any renewal notice which is subject to the requirements of section 1637(d) of this title, except that any State may employ or establish State laws for the purpose of enforcing the requirements of such sections.